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THE LAW REPORTS

[1925] 2 King's Bench

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THE

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OF THE INCORPORATED COUNCIL OF LAW REPORTING.

KING'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL,

DECISIONS IN

THE COURT OF CRIMINAL APPEAL

AND DECISIONS OF THE

RAILWAY AND CANAL COMMISSION.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART., K.C.

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1925.

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[1925] 1 K. B. 237, 246.

R. H. Nicholson also appeared for the plaintiff at the hearing before Swift J. and for the appellant in the Court of Appeal.

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DETERMINED BY THE

KING'S BENCH DIVISION

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COURT OF APPEAL

ON APPEAL THEREFROM

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AND BY THE

RAILWAY AND CANAL COMMISSION.

PARKINSON *v.* COLLEGE OF AMBULANCE, LIMITED, AND HARRISON.

1924
July 29, 30, 31.

[1923. P. 1114.]

Contract—Illegality—Public Policy—Bargain for Acquisition of Knighthood —Gift to Charity — Fraudulent Misrepresentations — Repudiation of Contract—Action to recover back Money paid.

If a contract which is illegal as being contrary to public policy has any element of turpitude in it the parties to the contract are in pari delicto, and if one of the parties to the contract has been defrauded, no action for damages can be maintained by the party defrauded, even though the contract is not of a criminal nature.

The secretary of a charity fraudulently represented to P. that he or the charity was in a position to undertake that P. would receive a knighthood if P. made a large donation to the funds of the charity, and undertook that the title would be conferred if the donation was made. P., relying upon those representations and in the belief that the secretary

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was authorized by the charity to give the undertaking, made a large donation to the funds of the charity. As P. did not receive the knighthood he brought an action against the charity and its secretary to recover back the money he had paid as money had and received or as damages for deceit or breach of contract:—

Held, that a contract for the purchase of a title, however the money is to be expended, is an improper and illegal contract, as being against public policy, and that as P. knew that he was entering into an improper and illegal contract he could not recover back the money he had paid from the charity as money had and received nor recover damages from the charity or its secretary nor claim to repudiate the contract as being still executory and recover back the money paid.

FURTHER consideration of an action tried before Lush J. and a special jury.

The defendants, the College of Ambulance, Ld., were incorporated in September, 1918, under the Companies Acts, 1908–1917, as a company limited by guarantee without share capital. The objects with which the college was formed were (inter alia) to establish a college or school for the teaching of the principles and practice of first aid and ambulance work, and to organize and carry on the administration of immediate aid and assistance to poor persons. The president of the college at the material times was H.R.H. Princess Christian, and it was governed by a council composed of a number of distinguished persons. The defendant Harrison was the managing secretary of the college and, subject to the direction of the principal, Sir James Cantlie, K.B.E., was the responsible administrative officer, and had control of the staff and the general business of the college. He was also mainly responsible for collecting funds for the college.

In October, 1921, the plaintiff, Colonel Parkinson, was approached by a gentleman, who asked whether he was interested in the subject of a knighthood. Subsequently the plaintiff was introduced to the defendant Harrison at the College of Ambulance. Harrison at an interview on October 10, 1921, told the plaintiff that he himself or the College of Ambulance had the power to nominate persons to receive titles of honour, and that he himself or the college through their president H.R.H. Princess Christian had a call upon a certain number of royal honours as distinguished

from political honours, that he or the college had already arranged for the grant of a peerage and a baronetcy in the then forthcoming list of honours, and that he or the College of Ambulance would arrange for the grant to the plaintiff of the honour of a knighthood, provided that the plaintiff would make a substantial payment by way of donation to the College of Ambulance. Harrison suggested that the plaintiff should pay 20,000*l.* to the college. At another interview on the following day Harrison repeated his former statements and said that the college would require 10,000*l.* He suggested that the plaintiff should purchase certain property at Birkenhead for the college and that he should also rebuild the college hall in Queen Anne Street. Ultimately it was agreed that the plaintiff should pay down 3000*l.* and that he should purchase the property at Birkenhead for 2000*l.*, which he should convey to the college, and provide other moneys, bringing the total amount up to 10,000*l.*, when he received his knighthood. Relying on Harrison's representations, the plaintiff handed to Harrison a cheque for 3000*l.* drawn in favour of the College of Ambulance. This money was paid into the banking account of the College of Ambulance. The plaintiff on October 13 received a letter of thanks for the donation from the council of the college, which was signed by the president, H.R.H. Princess Christian. On the following day the plaintiff received a letter from H.R.H. Princess Christian expressing her great appreciation and sincere gratitude for his splendid gift to the College of Ambulance, and that she was very pleased to hear of his promise to purchase property for the College of Ambulance in Liverpool and build the new lecture hall in Queen Anne Street. Princess Christian added that she had heard with interest of Colonel Parkinson's work for the country during the war.

The plaintiff was introduced to an official at the Unionist offices who, when the plaintiff informed him of the object of his visit and that he had paid 3000*l.* to obtain a knighthood, told the plaintiff that he had been fooled. The plaintiff did not receive a knighthood.

The plaintiff's solicitors wrote to Harrison on December 23,

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PARKINSON v. COLLEGE OF AMBULANCE, LD., AND HARRISON.

1921, demanding the return of the 3000*l.* On June 28, 1922, there was an interview between the plaintiff and his solicitor and Harrison, when the plaintiff again demanded the return of the 3000*l.* Harrison asked that the matter might be left over to the New Year. On February 8, 1923, the plaintiff's solicitors again demanded the return of the 3000*l.* Harrison replied on February 20, 1923, that the plaintiff gave 3000*l.* to the College of Ambulance as an act of charity and that it would be an unheard of thing for the college to return the money.

The plaintiff thereupon brought this action, in which he alleged that he paid the 3000*l.* relying on the representations of the defendant Harrison that he or the college could and would arrange for the grant to the plaintiff of the honour of a knighthood; that the defendant Harrison made the representations on behalf of himself and of the College of Ambulance; that all the representations which Harrison made were false, and were made fraudulently with intent to induce the plaintiff to pay the 3000*l.* The plaintiff claimed to recover the 3000*l.* as damages for deceit, or alternatively as money had and received by the defendants to the use of the plaintiff, or as damages for breach of warranty of authority.

The questions left to the jury and their answers were as follows:—

(1.) (*a*) Did Harrison represent that he was in a position to undertake that the plaintiff would receive a knighthood?—Answer: Yes. (*b*) Or did he only promise to use his influence for that purpose?—Answer: No.

(2.) (*a*) Was that statement false?—Answer: Yes. (*b*) Fraudulent?—Answer: Yes.

(3.) Was the plaintiff induced thereby to part with his 3000*l.*?—Answer: Yes.

(4.) Did the plaintiff contract with Harrison personally, looking only to him for securing the knighthood?—Answer: No.

(5.) Did he contract with him in the belief that he was acting for and had the authority of the college in giving the undertaking?—Answer: Yes.

(6.) Was Harrison in fact so authorized, or was he held out by the college as so authorized?—Answer: Certainly he was held out as so authorized, and we consider he was so authorized.

(7.) Did the plaintiff knowingly mislead the council into thinking that he was making a voluntary donation?—Answer: No.

(8.) Damages?—Answer: 3000*l.*

F. B. Merriman K.C. and *St. John Field* for the plaintiff asked for judgment.

Stuart Bevan K.C. and *D. N. Pritt* for the College of Ambulance. There is no evidence that Harrison was in fact authorized by the college to give the undertaking that the plaintiff would receive a knighthood or that he was held out by the college as being so authorized. The contract which the plaintiff made with Harrison was an illegal contract, as it was contrary to public policy. It is a case of the plaintiff giving money in order to receive an honour. It is immaterial that the inducement for the contract was not a bribe to an individual, but a donation to a charity. The material consideration is what had to be done in exchange for the payment. With regard to this matter Harrison was in the position of a stranger to the college, and the plaintiff can no more recover the 3000*l.* from the college than he could recover it from a hospital with which Harrison had no connection if the plaintiff had given the money to that hospital at Harrison's suggestion. The plaintiff cannot recover the money, because in order to maintain the action it is necessary for him to set up his illegal bargain. It is immaterial in that respect whether the contract is illegal or whether it is also immoral. The plaintiff also cannot recover the money as money had and received. It is true that money paid to a stakeholder can be recovered either before or after the event, but before it has been handed over, but money paid under an illegal contract cannot be recovered back where the property in it has passed: *Taylor* v. *Chester* (1); nor can it be recovered in a case where the illegal

(1) (1869) L. R. 4 Q. B. 309.

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contract has been partly performed: *Kearley* v. *Thomson*. (1) Any performance by the party receiving the money is sufficient to prevent the party paying the money from recovering it.

Rayner Goddard K.C. and *Croom-Johnson* for the defendant Harrison. The plaintiff can only bring an action against Harrison to recover damages for fraudulent misrepresentation; the plaintiff cannot recover from him the money he has paid as money had and received, because Harrison never received the money. A man cannot be heard to say that he is entitled to damages because he has been induced by fraud to enter into an illegal contract. Every man is presumed to know the law, therefore the plaintiff must be assumed to have known that the contract into which he was entering was an illegal contract and that he could not take any benefit under it. The plaintiff cannot recover, because to do so he would have to set up his own illegality. The general rule is contained in the maxim "Ex turpi causa non oritur actio." Fry L.J. in *Kearley* v. *Thomson* (2) said: "As a general rule, where the plaintiff cannot get at the money which he seeks to recover without shewing the illegal contract, he cannot succeed." Wilmot C.J. in *Collins* v. *Bluntern* (3) said: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again." To that general rule there are some exceptions—one is the case of oppressor and oppressed, in which case the oppressed party may recover the money back from the oppressor as the parties are not in pari delicto; a second exception is where a statute has been intended to protect a class of persons and the person seeking to recover is a member of the protected class. A third possible exception is where the person who has paid money for an illegal purpose seeks to recover it back before the illegal purpose is carried out: *Taylor* v. *Bowers*. (4) In some cases however where

(1) (1890) 24 Q. B. D. 742.
(2) 24 Q. B. D. 745.
(3) (1767) 1 Sm. L. C., 12th ed., 417; 2 Wils. 347, 350.
(4) (1876) 1 Q. B. D. 291.

the moral turpitude is great the Courts will not allow a locus pœnitentiæ. A person who has been a party to such a bargain as the plaintiff in this case entered into is guilty of moral turpitude. In *Fivaz* v. *Nicholls* (1) it was held that one of two parties to an agreement to suppress a prosecution for felony cannot maintain an action against the other for an injury arising out of the transaction. The Court held that as he could not make out his case except through the illegal transaction to which he was a party the action would not lie. In the present case the plaintiff by his statement of claim set up the illegal contract to which he was a party in order to make out his case. No distinction has ever been drawn between cases involving moral turpitude and cases of unlawful contracts, but not involving moral turpitude. In England compounding a felony is prohibited by the common law, but in *Hermann* v. *Charlesworth* (2) a contract to stifle a prosecution was put in the same category as a contract in restraint of trade which involves no moral turpitude. Vaughan Williams L.J. said in *Gordon* v. *Chief Commissioner of Metropolitan Police* (3) that the maxim "Ex turpi causa non oritur actio" "applies not only where the contract is on its face illegal, but also where the contract is opposed to public policy as arising out of an illegal transaction." It does not make any difference what the illegality is or how it arises. The fact that Harrison was fraudulent does not make any difference to the plaintiff's rights. The plaintiff could not have recovered if he had lost money in playing at cards, and the fact that his opponent had cheated by having five kings in the pack would not make the plaintiff's losses any the more recoverable. The element of fraud was present in *Fivaz* v. *Nicholls* (1), but nevertheless the plaintiff was held not entitled to recover.

[LUSH J. referred to *Reynell* v. *Sprye*. (4)]

That case is the authority for the proposition that where the parties are not in pari delicto the maxim does not apply.

(1) (1846) 2 C. B. 501.
(2) [1905] 2 K. B. 123, 136.
(3) [1910] 2 K. B. 1080, 1087.
(4) (1852) 1 D. M. & G. 660.

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There one party had advice, and intentionally misled the other who had no advice.

F. B. Merriman K.C. and *St. John Field* for the plaintiff. The plaintiff is entitled to recover the money he has paid back from the College of Ambulance on the ground that the council of the college are responsible for the fraud of their agent Harrison. The council authorized him to collect funds for the college, and the fraud of which Harrison has been guilty was committed in connection with the collection of the money which he was authorized to collect and not in connection with any other matter. The council delegated to Harrison the work of raising funds for the college. They never prohibited Harrison from holding out the prospect of obtaining titles for persons who gave large donations to the charity. They drew special attention to the fact that their president was H.R.H. Princess Christian. There is ample evidence to support the finding of the jury that Harrison was authorized by the council to give the undertaking that the plaintiff would receive a knighthood if he gave a large donation to the college in the letters from Princess Christian and the minutes of the Finance and General Purposes Committee. Further, the college have received the money which has been obtained through the fraud of Harrison, and they are liable for it as money had and received to the use of the plaintiff. The plaintiff is also entitled to recover the money on the ground that he retired from the contract before it was executed, as it was an illegal contract: *Taylor* v. *Bowers*. (1) In *Taylor* v. *Chester* (2), which has been relied upon by the defendants as an authority for the proposition that the plaintiff can not recover, there was no fraud, and further the contract had been carried out, whereas in the present case there was fraud on the part of Harrison, and the contract which the plaintiff entered into has not been executed. It may be that if a person is seeking to enforce an illegal contract there are no degrees of turpitude with regard to it. But where a person who has entered into an illegal contract seeks to

(1) 1 Q. B. D. 291, 300.

(2) L. R. 4 Q. B. 309.

retire from it on the ground that it is illegal, and claims to recover back the money paid under it before the contract has been carried out, a distinction has always been drawn between contracts disgraceful in themselves and those which are merely illegal: see *Tappenden* v. *Randall* (1), where Lord Alvanley C.J. said: "In the present transaction there was no moral turpitude whatsoever: and though it has sometimes been held that where there is moral turpitude in the contract, the Court will not allow the party who has advanced money on such a contract to recover it back; yet no argument of that sort can be urged in the present case." Heath J. also said "there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it. . . . . But where nothing of that kind occurs I think there ought to be a locus pœnitentiæ." In *Aubert* v. *Walsh* (2) it was held that as the action brought to recover back moneys paid for premiums on an illegal wager was brought before the period of time had elapsed on the expiration of which the decision of the wager depended, the plaintiff was entitled to recover, because he had rescinded the illegal contract. In *Hermann* v. *Charlesworth* (3) it was held that money paid under a marriage brokage contract, and which was therefore illegal on the ground of public policy, could be recovered back by the person who had paid it, although the other party to the contract had brought about introductions and incurred expense in doing so. That case shows that though something may have been done under an illegal contract, still the money paid can be recovered before the contract is in a real sense executed. *Lowry* v. *Bourdieu* (4) shows that where there is fraud on the part of one of the parties to an illegal contract they are not in pari delicto. In *Hughes* v. *Liverpool Victoria Legal Friendly Society* (5) the agent of the insurance society had made fraudulent misrepresentations to the plaintiff, thereby inducing her to make payment of premiums on policies which were

(1) (1801) 2 Bos. & P. 467, 470.
(2) (1810) 3 Taunt. 277.
(3) [1905] 2 K. B. 123.
(4) (1780) 2 Doug. 468.
(5) [1916] 2 K. B. 482.

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illegal and void through want of interest, and it was held that the plaintiff was entitled to recover back the moneys paid, as the parties were not in pari delicto. In *Kettlewell* v. *Refuge Assurance Co.* (1) the plaintiff was also held entitled to recover back premiums on policies which she paid owing to the fraudulent misrepresentation of the company's agent. In *Harse* v. *Pearl Life Assurance Co.* (2) on the other hand it was held that the plaintiff could not recover back the premiums paid, as the parties were in pari delicto, the representations having been innocently made by the insurance company's agent.

In *Fivaz* v. *Nicholls* (3) the plaintiff had to set up the fraud as part of the transaction and therefore he could not recover, whereas in the present case the fraud was antecedent to the contract and induced the contract; the parties are therefore not in pari delicto: see *Reynell* v. *Sprye.* (4) In all the cases cited as authorities for the proposition that the plaintiff cannot recover, the bargain that was set up by the plaintiff was of a criminal nature. A contract to purchase a knighthood is not prohibited by statute, and there is no moral turpitude in entering into such a bargain. Baronetcies were regularly purchased in the reign of James I. The most that can be said against it is that it may be contrary to public policy and unenforceable. In *Hanington* v. *Du-Chatel* (5) it was held that a bond granted for the purchase of an office of honour was void as against public policy. In *Earl of Kingston* v. *Pierepont* (6), where 10,000*l.* having been left by will to acquire a dukedom to the head of the family, it was held upon a demurrer to an action to have the money applied accordingly that it was illegal to acquire honour for money. That judgment was based upon the fact that a peer of the realm exercised judicial powers in judging and determining upon the rights and properties of the people of England. In *In re Wallace* (7) it was held that a gift to an individual provided

(1) [1908] 1 K. B. 545.
(2) [1904] 1 K. B. 558.
(3) 2 C. B. 501.
(4) 1 D. M. & G. 660.
(5) (1781) 1 Bro. C. C. 124.
(6) (1681) 1 Vern. 5.
(7) [1920] 2 Ch. 274.

the donee acquired a baronetcy or a superior title was not void as being contrary to public policy. It is difficult to see the distinction between that case and the present case of a gift to a hospital provided the donor received the honour of a knighthood. The Legislature and not the Courts ought to say that such contracts should be prohibited. The plaintiff, having been induced by the fraud of the defendants' servant to enter into this contract, is entitled to recover back the money paid by him. The college cannot benefit by the fraud of their servant, and therefore are not entitled to keep it. The plaintiff is entitled to recover the 3000*l.* from the defendant Harrison as damages for his deceit or as damages for breach of his warranty of authority.

Stuart Bevan K.C. in reply. *Hughes* v. *Liverpool Victoria Legal Friendly Society* (1) does not decide that where there is fraud the parties to an illegal contract are not in pari delicto, notwithstanding that they entered into it with knowledge of its illegality. In that case one of the parties entered into the contract innocently, believing it to be a lawful contract. In *Taylor* v. *Chester* (2), where it was held that the plaintiff could not recover back the money he had paid, the transaction was an immoral one, but not a criminal offence, and therefore it is not true to say that in every case in which it has been held that a plaintiff cannot recover because the contract was an illegal one, the bargain was with regard to a criminal offence. A contract to buy a knighthood is against public policy and is disgraceful, as it involves an insult to the Crown and a tendency to promote unlawful acts: see *In re Wallace.* (3)

[*Rayner Goddard K.C.* referred to *Egerton* v. *Earl Brownlow.* (4)]

Cur. adv. vult.

1924. July 31. LUSH J. read the following judgment: This case raises questions of considerable public importance. Before discussing them and stating what my view is with regard to them, there is a finding of the jury with regard

(1) [1916] 2 K. B. 482.
(2) L. R. 4 Q. B. 309.
(3) [1920] 2 Ch. 274, 297.
(4) (1853) 4 H. L. C. 1, 172, 177.

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to authority which I must deal with. I asked the jury whether the College of Ambulance in fact authorized or held Harrison out as authorized to give an undertaking to the plaintiff that he would receive the honour of knighthood if he contributed 10,000*l.* to the college. I do not think that the question of authority is really a material one. If the contract which the plaintiff made was a lawful one, he does not need to rely on it. If it was unlawful, his case is not strengthened by the jury's finding, as I will point out later. But I thought it better to take the jury's opinion. I reserved the question whether there was any evidence in support of such findings, should the jury answer the question in the plaintiff's favour. I had grave doubts whether the facts on which Mr. Merriman relied, and which I told the jury to consider, afforded any sufficient evidence. I told the jury that I thought that there was very little, if any, evidence of holding out, and that I thought that the question of actual authority was rather a question of law for me than a question of fact for them. After hearing arguments on the question, I am of opinion that there was no sufficient evidence either of holding out or of actual authority. I do not think that the council who control the affairs of the college or the committee did anything to mislead the plaintiff. There is no evidence at all that they held Harrison out as their ostensible agent. Nor do I think that the facts on which Mr. Merriman relied: the minute that he put in, the fact that the letter of December 23, 1921, claiming a return of the 3000*l.* was on the file, the statement by Mr. Pritchard that Harrison had been over zealous, but that he had not been suspended, or the letter of H.R.H. Princess Christian, the president of the college, are sufficient to justify the finding that there was an actual authority. In law there clearly was no implied authority. Harrison's duty was to collect subscriptions, not to make contracts or give undertakings as to securing titles for subscribers. So far as the evidence is concerned, the utmost that it does is to suggest that some of those who were interested in the affairs of the college—possibly the committee—knew that Harrison was

telling subscribers that the conferring of an honour might follow. But that is entirely different from contracting to secure it. I must, therefore, deal with the case on the footing that Harrison acted throughout without the authority, actual or ostensible, of the college.

I come, then, to the main questions in the case, and the first that I will deal with is the question whether the contract was against public policy and therefore illegal. In spite of Mr. Merriman's able argument I cannot feel any doubt that a contract to guarantee or undertake that an honour will be conferred by the Sovereign if a certain contribution is made to a public charity, or if some other service is rendered, is against public policy, and, therefore, an unlawful contract to make. Apart from being derogatory to the dignity of the Sovereign who bestows the honour, it would produce, or might produce, most mischievous consequences. It would tend to induce the person who was to procure the title to use improper means to obtain it, because he had his own interests to consider. It would tend to make him conceal facts as to the fitness of the proposed recipient. Moreover, if the contract was lawful, an action could be brought if the stipulated title was not obtained or if the money was not paid. A person in the position of this plaintiff could claim and be awarded damages for the loss of a title or for obtaining one of a less degree than that for which he had bargained; a person in the position of these defendants could claim and be awarded damages for not receiving the promised contribution, although the title had been obtained. No Court could try such an action and allow such damages to be awarded with any propriety or decency.

The contract, in my opinion, is one that could not be sanctioned or recognized in a Court of justice. Such a contract as that which the plaintiff and Harrison made is, in my judgment, an illegal and improper contract to enter into. I do not, of course, say that it involves the same degree of moral turpitude that an actually immoral contract involves; still less a contract to commit a crime; such, for example, as a contract between a man and woman that, in

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consideration of money paid to her, the woman should commit an act of immorality with the man, or, to use the illustration which Mr. Rayner Goddard suggested in the course of the trial, a contract with a procurer that he should procure a woman for an immoral purpose. The money paid by the plaintiff was not paid as the price or " wages " of immorality. It was not paid as a bribe to Harrison. It was paid to a public charity, a meritorious service in itself. But the contract which was entered into is not a contract which one can describe as innocent in itself. There are contracts which the law prohibits which are of that description. To take the case which I put to Mr. Stuart Bevan during the argument : the law does not allow an employer to bind his servant, after the service is over, not to carry on a competing business except within a reasonable area. If it is unduly extended the contract is in restraint of trade, and therefore against public policy, and therefore illegal. But it is not in itself an improper contract to make. The same may be said of a contract for the sale of certain classes of articles which are prohibited by statute unless certain conditions are fulfilled. But a contract for the purchase of a title, however the money is to be expended, is in itself an improper contract.

Now the first question to consider is this. The contract being against public policy, and being of the character that I have described, can the plaintiff still rely upon the fraud of Harrison and recover damages against him ; and can he, as against the college, recover the 3000*l.* which the college has received through that fraud, as money had and received to his use ? I am not prepared to hold—it is not necessary that I should decide the question—that in every case where a contract is against public policy, where one of the parties to it is defrauded by the other, he is prevented from recovering. It may be that whenever one party to a contract which is not improper in itself is unaware that it is illegal and is defrauded, the parties may not be in pari delicto. However that may be, I am of opinion that if the contract has any element of turpitude in it the parties are in pari delicto and no action for damages can be maintained by the party

defrauded. It is not correct to say, as was contended before me, that it is only if the contract is of a criminal nature that the plaintiff is precluded from recovering. The case of *Taylor* v. *Chester* (1) is an authority against this proposition. No criminal offence was committed there. And in *Fivaz* v. *Nicholls* (2), although a criminal offence was committed, the decision was not founded on that fact, but on the illegality and impropriety of the contract. It was also contended that fraud has the same effect as duress, and that it would be contrary to public policy to allow a party who has defrauded another to retain the fruits of his fraud. I cannot agree with that contention. The case of *Hughes* v. *Liverpool Victoria Legal Friendly Society* (3), which appears to support it, does not do so when the facts are considered. The fraud there was committed by an agent of the defendants who deceived the plaintiff into believing that an insurance could be properly effected and would be valid, although there was no insurable interest. The fraud there related to the validity of the contract. The agent of the insurance company, who knew that the contract was illegal, deceived the policy holder as to its validity. It was held that the parties were not in pari delicto, and that an action would lie to recover the premiums which the plaintiff had paid. The decision of the Court of Appeal in *Kettlewell* v. *Refuge Assurance Co.* (4) is another illustration of the same principle. These cases are very different from the present case. In the present case the plaintiff knew that he was entering into an illegal and improper contract. He was not deceived as to the legality of the contract he was making. How then can he say that he is excused ? How can he say that he has suffered a loss through being defrauded into making a contract which he knew he ought never to have made ? The answer is that he ought not to have made it. Where he was deceived was that he thought he would make a profit, derive a benefit from his unlawful act. He cannot be heard to say that. He has himself to blame for the loss that he has incurred. It is no

(1) L. R. 4 Q. B. 309.
(2) 2 C. B. 501.
(3) [1916] 2 K. B. 482.
(4) [1908] 1 K. B. 545.

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excuse to say that Harrison was more blameworthy than he, which is all that he really can say. That being the position, the plaintiff is in this difficulty. He cannot recover damages either against Harrison or the college, because he is disclosing or setting up a contract which is unlawful, and which he had no right to make. For the same reason he cannot recover the 3000*l.* from the college as money had and received. It is quite true that a principal cannot benefit by his agent's fraud, or a master by that of his servant. But the plaintiff is not in a position to rely on the fact that the college have benefited by their servant's fraud. He cannot reach that part of his case. He is precluded by the illegality of the contract from relying on it. Then can he rely on the principle which has been acted on in the cases that were cited to me that the contract being executory he can claim back from the college or Harrison the 3000*l.* that he has paid ? Can he resile from the contract, abandon it, and sue for the 3000*l.* ? The first difficulty in the plaintiff's way is that he is not in truth resiling from the contract at all. He is really bringing this action because he has failed to obtain the promised title. It seems to be something like an abuse of language to say that he is resiling from the contract, as the plaintiff did in *Hermann* v. *Charlesworth*. (1) If there is any locus pœnitentiæ in a case like this, which I do not think there is, there has been no pœnitentia. But if there has been, the plaintiff still cannot recover on the ground that the contract is executory. He cannot get back the 3000*l.* from Harrison, who never received it ; the college received it, and the college were never parties to any executory contract. Harrison was the contractor. Even if the college had authorized the contract, the other answer that I have given to the plaintiff's contention is, I think, complete. He never has resiled from an executory contract at all. But, further than that, the 3000*l.* was given to the college as a donation. The plaintiff received his letter of thanks for it from Princess Christian. His name would be in the list of donors. The matter was at an end so far as the

(1) [1905] 2 K. B. 123.

college was concerned. How can the plaintiff recall the gift and claim back the money?

In the result I must dismiss the action. The plaintiff has said that he brought it in order to put a stop to an improper practice, and not to recover the money for himself. Be that as it may, I am compelled to hold that it is not maintainable. I must give judgment for the defendants. As regards Harrison he has increased the costs of the litigation by denying the fraud, and having a long cross-examination administered to the plaintiff, and has not gone into the witness box or called any witnesses to meet it. He has acted oppressively, and I make an order depriving him of his costs.

Judgment for defendants.

NOTE.—An appeal was entered against this decision, but was subsequently withdrawn on terms.

Solicitors for plaintiff: *H. S. Wright & Webb.*

Solicitors for College of Ambulance: *Vizard, Oldham, Crowder & Cash.*

Solicitors for defendant Harrison: *Speechly, Mumford & Craig.*

R. F. S.

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Jan. 14, 15, 20.

ABRAHAMS *v.* MAC FISHERIES, LIMITED.

Landlord and Tenant—Lease—Covenant not to assign, underlet or part with Possession of Part of Premises without Consent—Breach—Parting with "possession"—Forfeiture—Enforcement—Action—Condition precedent—Notice—Conveyancing Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 14, *sub-ss.* 1, 6 (*i.*).

The Conveyancing Act, 1881, s. 14, provides: "(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. . . . . (6.) This section does not extend—(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; . . . .":—

Held, that sub-s. 6 (i.) of that section applies to a covenant against parting with the possession of part of the land leased; and consequently that in order that a right of forfeiture for breach of a covenant of that kind should be enforceable by action it is not necessary that the lessor should have served upon the lessee a notice under sub-s. 1.

Russell v. *Beecham* [1924] 1 K. B. 525, 535, judgment of Scrutton L.J., not followed.

Barrow v. *Isaacs & Son* [1891] 1 Q. B. 417; *Eastern Telegraph Co.* v. *Dent* [1899] 1 Q. B. 835; and *Elliott* v. *Boynton* [1923] 1 Ch. 422 applied.

Varley v. *Coppard* (1872) L. R. 7 C. P. 505, 507 observations applied.

A lease of two adjoining messuages and shops contained a covenant by the lessees that they would not assign, transfer, underlet, or part with the possession of the said premises or any part thereof other than an underletting for residential purposes only without the consent of the lessor not unreasonably withheld. The lessees agreed with a company of wine merchants to grant them an underlease of one of the messuages and shops subject to the consent of the lessor, a draft under-lease being prepared, and allowed them to occupy the premises, and there to execute repairs and to instal and carry on their business. The lessor refused consent to the under-lease:—

Held, that the lessees had committed a breach of the covenant not to part with possession of any part of the premises.

Peebles v. *Crosthwaite* (1897) 13 Times L. R. 37 distinguished.

ACTION tried by Fraser J. without a jury.

The plaintiff, Eva Abrahams, a married woman, was the owner of the premises hereinafter mentioned. The defendants, Mac Fisheries, Ld., were a company carrying on business as

fishmongers and poulterers, having some four hundred shops in the provinces and about a hundred in London.

By an indenture of lease dated January 1, 1924, the then owners of the premises, messuages, tenements and shops, Nos. 34 and 35 Thayer Street, in the parish of St. Marylebone, in the county of London, therein called the lessors, demised to the defendants, therein called the lessees, the said premises for the term of fourteen years from March 25, 1924, at the yearly rent of 400*l.*; the lease containing a covenant by the lessees by which they covenanted that they would not assign, transfer, underlet, or part with the possession of the premises or any part thereof, other than an underletting of the upper part for residential purposes only, without the previous consent in writing of the lessors, but so that such consent should not be unreasonably, arbitrarily or vexatiously withheld; and the lease further providing that if the lessees should at any time fail or neglect to perform or observe any of the covenants, conditions or agreements therein contained and on their part to be performed or observed, then and in any such case it should be lawful for the lessors or any person or persons duly authorized by them in that behalf into and upon the said premises, or any part thereof, in the name of the whole to re-enter, and the said premises peaceably to hold and enjoy thenceforth as if the lease had not been, without prejudice to any right of action or remedy of the lessors in respect of any antecedent breach of any of the covenants by the lessees thereinbefore contained.

The premises consisted of two shops with flats and tenements above them. The entrance to the staircase leading to the flats and tenements was by a door at the left-hand side of the front of the shop No. 35. About March 25, 1924, the defendants were given possession of No. 34 Thayer Street, and about June 24, 1924, they were given possession of No. 35. The upper part of the premises consisting of the flats and tenements were in the occupation of tenants subject to the Increase of Rent, &c. (Restrictions), Acts. On April 10, 1924, by a transfer under the Land Transfer Acts (38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65), 1875 and 1897, the lessors'

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reversionary interest in the said premises expectant upon the term created by the lease was transferred by the parties then entitled thereto to the plaintiff, in whom the same thereupon became vested.

The defendants were desirous of sub-letting the shop and premises No. 35 Thayer Street, and they accordingly instructed their agents, Messrs. James and Brotherstone, to take steps for that purpose. As a result correspondence passed between the agents and a Mr. J. G. Mauroux, the director and secretary of J. G. Mauroux, Ld., wine and spirit merchants, acting on behalf of that company. On June 5, 1924, after some preliminary negotiations and references given by the company, the agent wrote to the company: "We confirm arrangements made with you to-day to take the above shop [No. 35] at a yearly rental of 225*l.*, exclusive of rates and taxes. We confirm the landlords will allow you six months rent free in lieu of repairs, and should be glad to receive your cheque, value 22*l.* 10*s.*, as deposit which is to be deducted from the first payment of 56*l.* 5*s.*, which becomes due on Dec. 25, being a quarter's rent in advance." On June 12, 1924, Mr. Mauroux on behalf of the company wrote to the agents: "I hereby make you a firm offer to take the above premises on a full repairing lease for fourteen years or as near that period as possible, and to pay the rent of 225*l.* per annum exclusive for the first three years; thereafter the rent to be 250*l.* per annum exclusive, provided certain repairs are carried out, or alternatively I am allowed two quarters' rent in lieu of same. . . . ." On June 18, 1924, Messrs. Rowe and Maw, the solicitors for Mauroux, Ld., wrote to the defendants' agents enclosing their client's cheque for 35*l.*, and stating that they understood the 22*l.* 10*s.* on account of rent was to be credited to their clients in December, "and that in the meantime they are to be given possession of the premises in order that they may do such repairs as are considered necessary and as are in accordance with the terms of the lease. Will you kindly hand the bearer the key?" On the same date the defendants' agents wrote to the solicitors pointing out that no repairs could be put in hand until a

schedule of the same had been submitted to their superior landlord for approval, and stating that they had handed the key to Mr. Mauroux's representative, but had asked him to return it to the defendants in a few days.

A specification of the repairs to be done for Mauroux, Ld., dated June 19, 1924, and signed by the builders, stated that the latter would carry out the work in a workmanlike manner and in a short time for 112*l.* That specification was sent to the defendants' agents and by them to the defendants. On June 20, 1924, the defendants wrote to their agents: " . . . . We do not consider that the works contained in the specification . . . . will necessitate any reference to our superior landlord. In these circumstances, provided Mr. Mauroux understands that any works done by him prior to his agreeing the draft lease and our receiving licence to sublet to him from our superior landlord are carried out on his own responsibility, we have no objection to his commencing the work included in the specification. It is to be distinctly understood that should any hitch arise he must surrender possession immediately upon request, it being understood that no objection should be raised by us on the terms of the agreement already arrived at between the parties." A copy of that letter was sent by the defendants' agents to Mauroux, Ld. On June 23, 1924, the defendants wrote to their agents: " We regret to inform you that our landlord has withheld his consent for the subletting of the above premises. We have, however, placed the matter in the hands of our solicitors. . . . ." On June 24, 1924, the defendants' agents wrote to Messrs. Mauroux's solicitors, informing them that the superior landlord had withheld consent to the under-letting. On June 26, 1924, the former wrote to the latter sending them the draft sub-lease in duplicate, and stating that it was submitted subject to all necessary consents. On June 27, 1924, Messrs. Mauroux's solicitors wrote to the defendants' solicitor mentioning, among other things, that Mr. Mauroux had laid out a considerable sum in necessary alterations and in the installation of his business. On June 30, 1924,

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the defendants' solicitor wrote to Messrs. Mauroux's solicitors, stating that he had no doubt that sufficient particulars and references could be furnished to render any withholding of licence unreasonable, and that he noted that they were obtaining these. On the same date Messrs. Mauroux's solicitors wrote returning the draft lease approved. Messrs. Mauroux were then apparently installed in the premises and carrying out there the business of a wine merchant. On July 21, 1924, the defendants' solicitor wrote to Messrs. Mauroux's solicitors: "... The counterpart lease is ready for your client to execute, and I send it herewith for the purpose. It cannot however be proceeded with until the licence [from the superior landlord] is forthcoming, and my clients have not yet received adequate references to submit to their superior landlord. As soon as the licence is forthcoming the matter can be completed." On August 2, 1924, Messrs. Mauroux's solicitors wrote to the defendants that they could not admit that the defendants had any right to call upon Mr. Mauroux to vacate the premises. On August 6, 1924, the defendants' solicitor wrote to Messrs. Mauroux's solicitors that, failing their clients producing acceptable references, the proposed sub-letting would of course fall through, and their client would have to vacate the premises if in fact he had taken possession of them. On September 17, 1924, the former wrote to the latter that his clients had received notification from their lessor's solicitors that, unless the matter was put on a proper footing forthwith, proceedings would be instituted for forfeiture of the lease owing to Mauroux, Ld., being in occupation without consent; and that, failing the matter being disposed of in the course of the next day to the satisfaction of the defendants and their head lessor, he would have no alternative but to call upon Mauroux to vacate the premises instantly. On September 22, 1924, Messrs. Mauroux's solicitors wrote to the defendants' solicitor stating that they had had a visit that day from a Mr. Plummer representing the defendants, and that he had told them that the defendants must have possession of the premises that day; that they were not

in a position to comply with that demand; and that if any attempt should be made forcibly to take possession it would be resisted. On September 23, 1924, the defendants' solicitor wrote to Messrs. Mauroux's solicitors, pointing out that the terms upon which their client was in temporary occupation were set out in the defendants' letter to their agents dated June 20, 1924, and that the defendants proposed to exclude Messrs. Mauroux from their premises after the close of business on that day for their own protection as between themselves and their head lessor. On the same date Messrs. Mauroux's solicitors wrote to the defendants' solicitor stating that Mr. Mauroux had spent a considerable sum upon the property, and that they could not during his absence in France give up possession of the property on his behalf.

On September 23, 1924, the plaintiff brought the present action against the defendants to recover possession of the premises for breach of covenant in the lease thereof, and mesne profits. In her statement of claim the plaintiff stated (inter alia) (para. 5), that in breach of the above mentioned covenant the defendants had assigned or underlet or parted with the possession of the said premises or a part thereof without the previous consent in writing of the plaintiff, the particulars of the breach alleged being that the business of a wine and spirit merchant was carried on upon the premises from about the month of July until the month of September, 1924, by some person or company other than the defendants, which person or company were in possession of the premises, and that over the door was exhibited in block letters the notice, "J. G. Mauroux, Ld., licensed to sell wines and spirits to be consumed off the premises, 1924," and that the plaintiff claimed: (1.) Possession of the premises; (2.) mesne profits; (3.) alternatively, rent up to the date of the writ and mesne profits thereafter.

In their defence the defendants stated (inter alia) (para. 3) that they had neither assigned nor underlet nor parted with the possession of the premises nor of any part thereof, as alleged, or at all; and (para. 4) that alternatively the defendants would rely upon s. 14 of the Conveyancing Act,

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1881 (1), and that no notice as thereby required had been served on the defendants.

The action was tried on January 14 and 15, 1925. On behalf of the plaintiff, a Mr. Moore, a clerk in the employment of Messrs. Rowe and Maw, the solicitors for Mauroux, Ld., was called as a witness, and stated that he approved the draft sub-lease of No. 35 Thayer Street and had it executed by Mr. Mauroux; that in July and October, 1924, he went to the premises and saw there indications that Mauroux, Ld., were in possession, and were there carrying on business as wine and spirit merchants; and that 22*l.* 10*s.* was paid as a deposit by Mr. Mauroux and never returned, and that the repairs cost 112*l.* 10*s.* On behalf of the defendants evidence was given by a Mr. Byham, an assistant surveyor in their employment, and by a Mr. Barber who looked after their shop No. 34, with a view to showing that the defendants had not parted with possession of the premises No. 35 to Mauroux, Ld.

H. M. Giveen and *W. Lawson Campbell* for the plaintiff. The defendants committed a breach of their covenant in the lease not to assign, transfer, underlet or part with possession of the premises or any part thereof except as therein mentioned without the previous consent of the lessors not unreasonably withheld. It appears from the evidence supplied by the correspondence and the witnesses that the defendants entered into an agreement with Mauroux, Ld., to sub-let to them part of the demised premises—namely, No. 35 Thayer Street—and parted with possession of that part of the premises to them, allowing them there to effect repairs and to open a shop for the sale of wines and spirits without the consent of the plaintiff. The plaintiff is therefore entitled to recover possession of the premises, and arrears of rent and mesne profits.

R. M. Barrington-Ward K.C. and *W. H. Cartwright Sharp* for the defendants.

First, the defendants did not commit any breach of their

(1) The section so far as relevant is set out in the headnote.

covenant not to assign, transfer, underlet, or part with the possession of the demised premises or any part thereof without the consent in writing of the lessor. A tenant who himself retains the estate and interest in and the legal possession of the premises as a whole does not commit a breach of a covenant of that kind by merely letting another person into possession of and granting him a licence to use the premises or a portion thereof: *Peebles* v. *Crosthwaite* (1); *Jackson* v. *Simons* (2); and Redman's Law of Landlord and Tenant, 8th ed., p. 394. In the present case the defendants did not part with the estate and interest in or the legal possession of the premises or any part thereof to Mauroux, Ld. The evidence furnished by the correspondence and the witnesses shows that there was never any concluded agreement for a sub-lease of No. 35 Thayer Street between the defendants and Mauroux, Ld., but only a conditional arrangement for a sub-lease and legal possession of these premises if possible. All that the defendants gave to that company was a licence to occupy a part of the premises which prevented the defendants from treating the licensees as trespassers so long as the licence continued. The defendants have never yielded up the legal possession of No. 35. They have all along continued to collect the rents from the weekly tenants of No. 35. They informed Mauroux, Ld., directly or through their representatives, that the covenant in the lease prevented them from sub-letting or parting with the possession of the premises or any part thereof without the consent of the head lessor, and that that consent had not been obtained. They informed them in effect that, if they took possession of any part of the premises, they would do so at their peril and might be turned out at any time.

Secondly, if the defendants have committed any breach of the covenant, the plaintiff's right of entry or forfeiture under the lease is not enforceable by action or otherwise, inasmuch as she has not, pursuant to the Conveyancing Act, 1881, s. 14, sub-s. 1 (3), served upon the defendants a notice

(1) 13 Times L. R. 37, 198. (2) [1923] 1 Ch. 373.
(3) See headnote.

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specifying the breach complained of and requiring the defendants to remedy it and to make compensation. It is true that sub-s. 6 (i.) (1) of that section provides that the section does not extend to a covenant against assigning, underletting, parting with possession or disposing of the land leased. In the present case, however, it is not alleged that the defendants committed a breach of covenant by underletting or parting with possession of the premises leased, but only of part of them. Unless, therefore, sub-s. 6 (i.) applies to a covenant against underletting or parting with possession of part of the premises, it does not exempt the plaintiff from the obligation to give notice under the section. That clause on its true construction only applies to a covenant restraining the alienation of the land as a whole, and does not extend to a covenant which only restrains the alienation of part of the land.

The weight of authority goes to show that a covenant not to assign, underlet or part with possession of part of the land leased is an entirely different covenant from a covenant in similar terms relating to the land as a whole. In *Church* v. *Brown* (2) Lord Eldon stated that a covenant not to part with possession of premises would not restrain the tenant from parting with part of the premises. In *Jackson* v. *Simons* (3) that view was applied, and it was held that a covenant against sharing the possession of any part of the premises was different from a covenant not to part with the whole, and was not covered by sub-s. 6 (i.). In *Chatterton* v. *Terrell* (4) Lord Wrenbury said that a covenant not to assign or underlet the premises was not broken by an assignment or sub-lease of part. In *Russell* v. *Beecham* (5) Scrutton L.J. dealt with this very point, and held that a covenant not to part with a part of the premises was a different covenant from a covenant against parting with possession of the premises, and that therefore a notice under the section in question was required before a forfeiture for

(1) See headnote.
(2) (1808) 15 Ves. 258.
(3) [1923] 1 Ch. 373.
(4) [1923] A. C. 578, 585.
(5) [1924] 1 K. B. 525, 536.

breach of the former covenant could be enforced. Bankes and Atkin L.JJ. refrained from dealing with that point, and said nothing to the contrary. The statement of Scrutton L.J. is a correct expression of the law. The cases of *Barrow* v. *Isaacs & Son* (1) and *Eastern Telegraph Co.* v. *Dent* (2) are not authorities to the contrary. In these cases the Court did not consider whether a covenant against underletting the premises included a covenant against underletting part of the premises, but merely held that the tenant was not entitled to equitable relief against forfeiture for breach of covenant.

[FRASER J. referred to *Varley* v. *Coppard* (3) and *Grove* v. *Portal* (4).]

The former of these cases was decided before the Act of 1881 had come into force, and the observations there made by Willes J. were only obiter dicta.

Giveen in reply. First, the defendants committed a breach of the covenant not to part with the possession of the premises or any part thereof. A covenant of that kind is inserted in a lease for the very purpose of meeting the case in which the tenant permits a third party to have possession of the premises without granting him an estate therein. A tenant commits a breach of that covenant by giving up to another the legal possession of part of the premises. In *Horsey Estate, Ld.* v. *Steiger* (5), where it was held that a covenant against assigning without consent was not broken by letting purchasers into possession, Lord Russell C.J. said that if the covenant had been against parting with possession the plaintiffs would have proved a breach of that covenant. Here the defendants clearly committed a breach of the covenant. They entered into an agreement with Mauroux, Ld., to give them possession of the premises No. 35 Thayer Street subject to the consent of the superior lessor being obtained, and pursuant to that agreement they allowed them to take possession. Mauroux, Ld., obtained a specification for repairs to the premises, and they had these repairs done and opened these premises as a

(1) [1891] 1 Q. B. 417.
(2) [1899] 1 Q. B. 835.
(3) L. R. 7 C. P. 505, 507.
(4) [1902] 1 Ch. 727.
(5) [1899] 2 Q. B. 79.

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wine shop. These steps could not have been taken without the knowledge of the defendants. The fact that the defendants did not call their representatives, Mr. Plummer and Mr. Ross, as witnesses shows that they could not deny that these steps were taken with their consent. The case of *Peebles* v. *Crosthwaite* (1) is distinguishable, because there the tenants only allowed the company to occupy the premises for a special purpose and did not themselves part with possession.

Secondly, s. 14, sub-s. 6 (i.) (2) of the Act of 1881 applies to a covenant against assigning, underletting or parting with possession not only of the land leased as a whole, but also of part of it; and therefore it was not necessary that the plaintiff should give the defendants notice under sub-s. 1 in order that they might maintain the action. In *Russell* v. *Beecham* (3) Scrutton L.J. no doubt expressly decided the contrary of that proposition, but the other two members of the Court of Appeal refrained from dealing with the point, and the decision of Scrutton L.J. is not binding on this Court if there is any decision of the Court of Appeal which is inconsistent with it. The decisions of the Court of Appeal in *Barrow* v. *Isaacs & Son* (4) and *Eastern Telegraph Co.* v. *Dent* (5) are inconsistent with the decision of Scrutton L.J., and are by necessary implication decisions to the contrary effect, and this Court is therefore bound by these decisions and not by the decision of Scrutton L.J.

Jan. 20. FRASER J. This is an action of forfeiture of a leasehold interest by reason of an alleged breach of a covenant contained in an indenture of lease dated January 1, 1924. The lease was for a term of fourteen years from March 25, 1924, at a rent of 400*l.* per annum payable quarterly, the first payment to be made on June 24, 1924. It contained a covenant by the defendants as lessees that they would not assign, transfer, underlet or part with the possession of the said premises or any part thereof other than an underletting

(1) 13 Times L. R. 37, 198.
(2) See headnote.
(3) [1924] 1 K. B. 525, 536.
(4) [1891] 1 Q. B. 417.
(5) [1899] 1 Q. B. 835.

of the upper part thereof for residential purposes only without previous consent in writing by the lessors, but that such consent should not be unreasonably, arbitrarily or vexatiously withheld. The lease also contained a proviso for re-entry on breach of covenant. On April 10, 1924, the lessor's interest in the premises became vested in the plaintiff. [His Lordship stated the facts relating to the position, construction and occupants of the premises and continued :] The plaintiff alleges that in breach of the covenant the defendants have assigned or underlet or parted with the possession of the said premises or of part thereof without the previous consent in writing of the plaintiff. In her statement of claim she sets out the particulars upon which she relies, and claims possession of the said premises and mesne profits, or, alternatively, rent up to the date of the issue of the writ and mesne profits thereafter.

The defendants raise two defences : First, that they have neither assigned nor underlet nor parted with the possession of the premises, nor any part thereof ; and, secondly, that they rely upon s. 14 of the Conveyancing Act, 1881, and upon the fact that no notice as thereby required has been served upon them.

As to the first point raised by the defence, the defendants apparently desired to retain possession of the shop No. 34 Thayer Street for the purposes of their own business, and to let No. 35, the lock-up shop as it was called. With a view to letting No. 35 the defendants instructed their estate agents, Messrs. James and Brotherstone, to let this shop. At this point the correspondence becomes material. [His Lordship considered at length the correspondence and the evidence relating to the proposed underlease of the shop No. 35 by the defendants to Mauroux, Ld., and the occupation thereof by the latter and continued :] On the correspondence and on the evidence certain facts seem to be quite clear. I do not think that the facts of this case are at all like those in *Peebles* v. *Crosthwaite*. (1) I think that here there was clear parting with the possession of part of the premises

(1) 13 Times L. R. 37, 198.

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by the defendants. The handing over of the key, one knows on the authorities, is not necessarily conclusive, but there is no doubt on the facts that here the key was in the hands of and used by Mr. Mauroux and his manageress. There is equally no doubt that they were in possession of the shop for a very considerable period, and refused to go out until at last they were forcibly ejected, that Mr. Mauroux was carrying on his business there, and that his name was over the door in the way described. I think the case is clearly one in which the defendants committed a breach of the covenant by parting with the possession of part of the premises. It is quite true, apparently, on the evidence, that the cheque for 35*l*., which was given on behalf of Mr. Mauroux to the defendants' agents, Messrs. James and Brotherstone, was never cashed. It seems to have remained, so far as I can make out, in their possession. I have already said that substantial repairs were carried out, and it seems to me that this matter of repairs was prominently in the minds of the parties. The defendants appear to be saying that they have got everything they want, and are quite satisfied, that the terms of the underlease are agreed, that the repairs are to be done, that Mr. Mauroux should go in and carry on business; that of course if later on there should be any hitch, as they do not anticipate, then they would have to do what? Give up possession. Go in, say the defendants, and we believe it will be all right, but if a hitch occurs then you will have to give up possession. I lay stress upon those phrases, the word "possession," used again and again, the references to money spent on the doing of repairs and the installation of the business. Then, as counsel for the plaintiff pointed out, it is a remarkable fact that the defendants do not put into the witness box Mr. Plummer, their representative, or Mr. Ross, who was acting in the matter. They only called Mr. Byham, who is not a head official but an assistant, and Mr. Barber, their shop manager. The evidence of these witnesses in no way displaces what one naturally infers from the correspondence, and from the evidence put in on behalf of the plaintiff, coupled with

the verbal evidence of Mr. Moore. That disposes of the first point raised on behalf of the defendants.

The second point raised by way of defence in this action presents considerable difficulty. The defendants rely upon s. 14 of the Conveyancing Act, 1881 (1), and say that no notice as thereby required has been served upon them. They contend that even if they did part with the possession of part of the premises that is not a breach of a covenant against the parting with the possession of the premises and does not come within the exception in s. 14, sub-s. 6. On the one hand it was urged upon me on behalf of the defendants that I was bound to follow the judgment of Scrutton L.J. in *Russell* v. *Beecham* (2), in which the learned Lord Justice held that a covenant against parting with the possession of part of the premises is a different covenant from a covenant against parting with the possession of the premises, and that the former covenant was not within the exception in s. 14, sub-s. 6 (i.), and that, therefore, a notice under sub-s. 1 was necessary before the plaintiffs could enforce a right of entry for a breach of it. In that case the other members of the Court of Appeal expressed no opinion on this particular point. Bankes L.J. is reported to have said (3): "I will take the second point first. It was said that a notice was necessary, because this case did not fall within the exceptions in sub-s. 6 (i.), which provides that sub-s. 1 is not to extend to a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; it was urged that a covenant not to part with possession of the whole of the demised premises and a covenant not to part with possession of part of the demised premises are two separate and distinct covenants; that there has been no parting with possession of the whole of the premises but only a parting with possession of part of the premises, and that sub-s. 6 contains no exception of a covenant not to part with possession of part of the premises, and therefore before a lessor can insist on a forfeiture for breach of that

(1) See headnote. (2) [1924] 1 K. B. 525.
(3) [1924] 1 K. B. 532.

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covenant a notice under s. 14, sub-s. 1, is necessary. Speaking for myself, if it were necessary to decide upon the merits of that argument I should like to give further consideration to it, because the results of accepting it would be very far-reaching. But I do not propose to offer any opinion upon this question." Atkin L.J. said (1): "Upon the ground relied on by Scrutton L.J., and the construction of s. 14 of the Conveyancing Act, 1881, I prefer to say nothing one way or the other."

On the other hand, my attention was drawn by Mr. Giveen on behalf of the plaintiff to numerous cases decided since the Conveyancing Act, 1881, in which the point of law as decided by Scrutton L.J. would have been a defence in each of the cases referred to, and it was said that it is significant that no reference was made by any of the eminent judges in these cases to this point, nor was the point taken as a defence by any of the experienced counsel who appeared on behalf of the defendants in these cases. In particular, reliance was placed on the observations of Kay L.J. in the Court of Appeal in *Barrow* v. *Isaacs & Son* (2), as showing that the learned Lord Justice had at the time prominently in his mind s. 14 of the Conveyancing Act, 1881, and in particular the provisions of sub-s. 6 of that section.

The judgment of Scrutton L.J. in *Russell* v. *Beecham* (3) does not bind me, although, of course, I am bound to, and do, treat it with the utmost respect. It would appear from the report of that case that the point now under consideration was the last point raised by the respondent's counsel in their argument, and that the attention of the Court was not directed to the line of cases to which I have referred above as having been cited to me on behalf of the plaintiff in the present action. In his judgment Scrutton L.J. refers to *Jackson* v. *Simons* (4), in which Romer J. held that a covenant against sharing possession was another and a different covenant from a covenant against assigning, underletting or parting with possession, and was not included in the exception in

(1) [1924] 1 K. B. 539.
(2) [1891] 1 Q. B. 417, 430.
(3) [1924] 1 K. B. 525.
(4) [1923] 1 Ch. 373.

sub-s. 6, and therefore notice was necessary before the forfeiture could be enforced. Scrutton L.J. then proceeds (1): "The covenant in the present case is not against sharing possession; it is against parting with the premises or any part thereof. The question is whether a covenant against parting with possession of part of the premises is included in a covenant against parting with the possession of the land leased. I might have been slow in coming of myself to a conclusion on this question; but I find that in *Church* v. *Brown* (2) Lord Eldon, whose doubts were said to be more valuable than other men's certainties, said that a covenant not to part with possession of premises would not restrain the tenant from parting with a part of the premises; these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation. The question was whether a covenant against assigning without licence was a usual covenant in a lease. Lord Eldon argues, if that is a usual covenant, is a covenant against underletting, which is another and a different covenant, also a usual covenant? And if it is, is a covenant against parting with possession a usual covenant? And if it is, what of yet another and different covenant—namely, a covenant not to part with a part of the premises? Is this also to be considered a usual covenant? I am content to follow Lord Eldon, and to hold that a covenant not to part with a part of the premises is a different covenant from a covenant against parting with the possession of the premises; that therefore a notice was required before a forfeiture could be enforced, and consequently that the action fails." In view of Scrutton L.J.'s observations as to Lord Eldon's dictum in *Church* v. *Brown* (2), I may refer to a dictum of the eminent judge, Sir James Shaw Willes, in *Varley* v. *Coppard*. (3) In that case two persons, partners in trade, were assignees of a lease which contained a covenant by the lessee for himself and his assigns that he would not, neither should his executors, administrators, or assigns, assign the

(1) [1924] 1 K. B. 525, 536. (2) 15 Ves. 258.
(3) L. R. 7 C. P. 505, 507.

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demised premises without the consent in writing of the lessor. On the dissolution of the partnership one of the assignees assigned all his interest in the premises to the other. It was held by Willes J. that there was a breach of the covenant, and the learned judge in giving judgment used these words: "The covenant, though it relates to the estate of the two, necessarily involves the interest of each: it means that neither of them shall assign the whole or any part of his interest without consent; otherwise, a tenant might assign all but a sixty-fourth part. . . . . I cannot think that the assignment of the sixty-three parts would be anything but a breach of the covenant."

It is important, however, to emphasize and bear in mind that the question which I have to decide is the construction to be given to a section in an Act of Parliament and not to a particular covenant in a lease. It is, of course, clear on the cases that in a lease a covenant not to part with possession of the demised premises means the whole of the demised premises and is not broken by an assignment of part. But, in the words of Joyce J. in *Grove* v. *Portal* (1), "the reason of that, no doubt, is that these covenants have always been construed with the utmost jealousy to prevent the restraint from going beyond the express stipulation." In *Crusoe* v. *Bugby* (2) the judgment is to this effect: "The Courts have always held a strict hand over these conditions for defeating leases. Very easy modes have always been countenanced for putting an end to them." In construing a statute the object is to ascertain the meaning of the Legislature, and in order to ascertain the true meaning it is necessary to ascertain the circumstances with reference to which the words were used and what was the object appearing from those circumstances which the Legislature had in view: see *River Wear Commissioners* v. *Adamson* (3), and particularly the observations of Lord Blackburn. (4) The object of s. 14 is to give relief to lessees in case of forfeiture by making it compulsory for landlords to give notice of any breaches of covenant by

(1) [1902] 1 Ch. 727, 731.
(2) (1771) 2 W. Bl. 766.
(3) (1877) 2 App. Cas. 743.
(4) Ibid. 763.

which forfeiture has been incurred and enabling them to remedy the loss caused by such breaches before the forfeiture can be enforced. The exceptions in sub-s. 6 are made to cover cases where the breach cannot be remedied specifically, and such cases logically include cases where possession of part of the premises has been parted with as well as cases where possession of the whole of the premises has been parted with. In my opinion it would be an anomaly to construe the exception in such a way as to exclude from it the former cases, since the lessee cannot remedy the breach any more easily in the one case than in the other. In this connection the history of the legislation in regard to relief against forfeiture, which is dealt with by Kay L.J. in *Barrow* v. *Isaacs & Son* (1), seems to me very material. In my opinion it is in accordance with the spirit of the Act and the history of the law as to relief against forfeiture to construe the language of sub-s. 6 (i.) in the wider meaning, so that a covenant against parting with the possession of part of the premises is within the exception in sub-s. 6.

A further, and in my opinion a strong, argument against the construction placed upon the statute by Scrutton L.J. is the point taken on behalf of the plaintiff in the present action, which I have noticed above—namely, that since the Conveyancing Act of 1881 there have been in the Court of Appeal and the Courts of first instance numerous actions for forfeiture consequent on parting with possession of part only of the premises, and that in not one of those cases has the point been raised that no notice has been given under s. 14: see, for instance, *Barrow* v. *Isaacs & Son* (2), and particularly the passage in reference to this section in the judgment of Kay L.J. (3); *Eastern Telegraph Co.* v. *Dent* (4); and *Elliott* v. *Boynton*. (5) It has, in fact, been tacitly assumed that such a defence would not be successful, and this practice, which has held for a considerable number of years, is an argument as to the general understanding of the section.

(1) [1891] 1 Q. B. 425, 429, 430.
(2) [1891] 1 Q. B. 417.
(3) [1891] 1 Q. B. 417, 430.
(4) [1899] 1 Q. B. 835.
(5) [1923] 1 Ch. 422.

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So far as I can ascertain from the text-books the practice of conveyancers appears also to support the view which I have indicated above as to the true construction and effect of sub-s. 6 (i.) of s. 14: see, for instance, the marginal note on p. 691 of the 5th ed. of Key and Elphinstone's Precedents in Conveyancing, which was edited by the late Sir Howard Elphinstone, one of the conveyancing counsel of the Court. That note refers to s. 14, sub-s. 6 (i.), and states that a covenant that the lessee will not assign, underlet, or part with the possession of the premises or any part thereof is excepted out of s. 14 of the Act.

In conclusion, therefore, I respectfully differ from the judgment of Scrutton L.J. in *Russell* v. *Beecham* (1), and I hold that the second point which the defendants have raised by way of defence also fails. The plaintiff is entitled, therefore, to succeed in his action. I accordingly give judgment for the plaintiff for (1.) possession of the two shops and premises known as Nos. 34 and 35 Thayer Street, St. Marylebone, in the County of London; (2.) arrears of rent up to date of issue of writ, and mesne profits from that date up to to-day. I think it is clear from *Elliott* v. *Boynton* (2), which I mentioned for another purpose, that the mesne profits are assessable from the date of the writ in the action and not from the date of the breach of the covenant giving rise to the landlord's right of action.

Judgment for plaintiff.

Solicitors for plaintiff: *Harris, Chetham & Cohen.*
Solicitors for defendants: *Janson, Cobb, Pearson & Co.*

(1) [1924] 1 K. B. 525. (2) [1923] 1 Ch. 422.

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GRAHAM *v.* GREEN (Inspector of Taxes).

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March 10, 11.

Revenue—Income Tax—Livelihood gained by backing Horses at starting Price—Profits or Gains—Vocation—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D* 1 (*a*) (*ii.*), *Cases* 2, 6.

The appellant's sole means of livelihood was derived from backing horses from his residence at starting price:—

Held, that the aggregate of winnings was not derived from a vocation nor were the winnings "profits" or "gains" within the meaning of Sch. D, and that he was not assessable to income tax in respect thereof.

Partridge v. *Mallandaine* (1886) 18 Q. B. D. 276 distinguished.

Case stated by Commissioners for the General Purposes of the Income Tax for the division of Burnham, Buckinghamshire.

The appellant, Mr. Alexander Graham, of Amersham, appealed against an assessment of 300*l.* under Sch. D to the Income Tax Act, 1918 (8 & 9 Geo. 5, c. 40), for the year ended April 5, 1924, in respect of betting transactions. The appellant betted on horses at starting price from his residence, and that was his only means of livelihood, and had been so for some years, apart from a certain amount of interest on money on deposit at his bank.

It was contended for the Crown that the appellant was assessable under Sch. D (1.) of the Act of 1918, in respect of "(*a*) The annual profits or gains arising or accruing . . . . (ii.) . . . . from any trade, profession, employment, or vocation," and "(*b*) . . . . other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax." It was contended that the appellant's liability was properly assessed under Case 2 in respect of a vocation, or, alternatively, under Case 6 "in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other schedule."

The Commissioners decided that the assessment was rightly made.

Barrington-Ward K.C. and *Sandlands* for the appellant. This backing of horses was not a trade or vocation. The betting was done at starting prices, and no business or system

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can be constructed out of betting at starting prices. With a bookmaker it is different, and he is liable to income tax on betting profits: *Partridge* v. *Mallandaine*. (1) The bookmaker bets on a system by adjusting the odds, and the backer, the appellant, merely shares in other people's losses; if he is lucky he wins, if unlucky he loses. In *Ryall* v. *Hoare* (2) Rowlatt J. spoke of profits as being the fruit of the tree. Here there was no tree; there was no capital and no evidence of continuity, but merely individual bets.

Sir T. Inskip S.-G. and *R. P. Hills* for the respondent. This case cannot be distinguished from *Partridge* v. *Mallandaine* (1), where a bookmaker was held to be taxable. It is found as a fact that the appellant bets for a livelihood and that it is his livelihood; therefore he does not do it casually, for amusement. It is a vocation which results in profits or gains. What he does is deliberate and not fortuitous; he turns his experience and knowledge into profits and gains. The fact that it is gambling makes no difference. There is no distinction between the bookmaker who lays the odds and the backer who takes them; both are taking a risk. And if the appellant is relying on betting to support himself, he is carrying on a vocation—namely, that of a backer of horses.

Barrington-Ward K.C. in reply. If the Revenue authorities are right that this is a vocation, a business man could set off his betting losses against his business profits, and that cannot have been intended by the Legislature. It would make the State a partner in his betting transactions.

Cur. adv. vult.

March 11. ROWLATT J. In this case the appellant was in the habit of betting on horses at starting prices. He did it on a large and sustained scale, and he did it with such shrewdness that he made an income out of it, and it is found that substantially it was his means of living. Under those circumstances he has been assessed to income tax in respect of those emoluments, and hence this appeal.

The question arises under Case 2 and under Case 6 of

(1) 18 Q. B. D. 276. (2) [1923] 2 K. B. 447, 454.

Sch. D. It arises under Case 6 upon the question whether the winnings on the appellant's bets as bets are "profits or gains" within the meaning of that case. It arises under Case 2 on the question whether, assuming the winnings from the bets themselves are not profits or gains, the aggregate of his winnings, as the result of his sustained and continued action, are the profits or gains of a "vocation" or possibly, as it might have been put, of a trade or adventure within the meaning of the general words of Case 1.

Looking first at Case 6, one is faced with the difficult question of what is profit or gain. My attention, of course, was drawn to my decision in *Ryall* v. *Hoare* (1), which was the case of an appellant who had guaranteed an overdraft for a company of which he was a director. He was paid a commission for it, and it was the only time in his life that he ever did anything of the sort. The question before me there was not whether a commission paid to a man for a service of this kind was a profit or gain in itself, which it obviously was, as a payment for commercial services rendered, but whether it was an annual profit or gain. In the course of my judgment I said that a mere receipt by finding an object of value, or a mere gift, was not a profit or gain, and I do not feel much doubt about that. I further said that the winning of a bet did not result in a profit or gain. Until I am corrected, I think I was right in that. Whether it is a gift or whether it is a finding, there is nothing of which there is a profit. There is no increment, there is no service, there is merely the picking up of something either by the will of the person who had it before or because there is no person to oppose the picking up. When one comes to the question of a bet, it seems to me that the position is substantially the same. What is a bet? A bet is merely an irrational agreement that one person should pay another person something on the happening of an event. A. agrees to pay B. something if C.'s horse runs quicker than D.'s or if a coin comes one side up rather than the other side up. There is no relevance at all between the event and the

(1) [1923] 2 K. B. 447.

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acquisition of property. The event does not really produce it at all. It rests, as I say, on a mere irrational agreement.

So much for Case 6. But then there is no doubt that if you set on foot an organized seeking after emoluments which are not in themselves profits, you may create, by way of a trade, or an adventure, or a vocation, a subject matter which does bear fruit in the shape of profits or gains. A different conception arises, a conception of a trade or vocation which differs in its nature, in my judgment, from the individual acts which go to build it up, just as a bundle differs from odd sticks. You may say, I think, without an abuse of language, that there is something organic about the whole which does not exist in its separate parts.

It is said that the appellant, by continually betting from his house or from any place where he could get access to the telegraph office, had set up a vocation. That is contended by the respondent on the facts of this case, and certainly the contention is one which, if sound, has very startling results. A loss in a vocation, or a trade, or an adventure can be set off against other profits and we are face to face with this result, that a person earning a profit in some recognized form of industry, but having the bad habit of frequently, persistently and continuously and systematically betting with bookmakers, might for income tax purposes set off the losses by which he had squandered the fruits of his industry against his profits of industry, a very remarkable result indeed and one, I am afraid, which would be of very wide application. Allowances are granted to the income tax payer because of the family he has to support, and we are now threatened with a further allowance in respect of the loss which he makes by habitual betting. It certainly sounds very remarkable, and would entitle a person, when he wastes his earnings by betting, to make the State a partner in his gambling. However, the question must be faced.

As I have said, there is no doubt that one might create a trade by making an organized effort to obtain emoluments which are not in themselves taxable as profits, and the most familiar instance of all, of course, is a trade which has for

its object the securing of capital increment. A person who buys an object which subsequently turns out to be worth more than he gave for it, and which he sells, does not thereby make a profit or gain for income tax purposes. But he can organize himself to do that in a commercial and mercantile way, and the profits which emerge are taxable profits, not of the transaction, but of the trade. In the same way, he may carry on the trade of selling things which he has not got and buying them when the price has fallen. That is a capital accretion, only the operations are reversed. He sells first and buys afterwards. And in that way he may make losses or he may make profits. If he makes losses, the losses cannot be said to be the results of the individual acts; they are the results of the trade as a whole. Test it in this way. A person may organize an effort to find things. He may start a salvage or exploring undertaking and he may make profits. The profits are not the profits of the findings, they are the profits of the adventure as a whole. Again he may make a loss. One cannot say that the loss was due to the failure to find. The loss is due to the trade. That is a good test, because it shows the difference between the trade as an organism and the individual acts.

So much is clear, I think, with regard to the cases of making a trade or a vocation or an adventure of obtaining differences in prices or obtaining things which are the subject of finding. The trade or vocation which has to do with difference in prices may be popularly spoken of as gambling, because there is no intention to accept or deliver the thing bought and sold. But the operations in those cases are operations in relation to the difference of prices of commodities, and there is an element of fecundity in them, and indeed those operations form the subject matter of a great deal of trade.

Now we come to betting, pure and simple. It has been settled that a bookmaker carries on a taxable vocation. What is the bookmaker's system? He knows that there are a great many people who are willing to back horses, and that they will back horses with anybody who holds himself out to give reasonable odds as a bookmaker. By calculating

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the odds in the case of various horses over a long period of time and quoting them so that on the whole the aggregate odds, if I may use the expression, are in his favour, he makes a profit. That seems to me to be organizing an effort in the same way that a person organizes an effort if he sets out to buy himself things with a view to securing a profit by the difference in their capital value in individual cases.

Now we come to the other side, the man who bets with the bookmaker, and that is this case. These are mere bets. Each time he puts on his money at whatever may be the starting price. I do not think he could be said to organize his effort in the same way as a bookmaker organizes his, for I do not think the subject matter from his point of view is susceptible of it. In effect all he is doing is just what a man does who is a skilful player at cards, who plays every day. He plays to-day, and he plays to-morrow, and he plays the next day, and he is skilful on each of the three days, more skilful on the whole than the people with whom he plays, and he wins. But it does not seem that one can find, in that case, any conception arising in which his individual operations can be said to be merged in the way that particular operations are merged in the conception of a trade. I think all you can say of that man, in the fair use of the English language, is that he is addicted to betting. It is extremely difficult to express, but it seems to me that people would say he is addicted to betting, and could not say that his vocation is betting. The subject is involved in great difficulty of language, which I think represents great difficulty of thought. There is no tax on a habit. I do not think "habitual" or even "systematic" fully describes what is essential in the phrase "trade, adventure, employment, or vocation." All I can say is that in my judgment the income which this gentleman succeeded in making is not profits or gains, and that the appeal must be allowed, with costs.

Appeal allowed.

Solicitors for appellant: *Mott & Parkes.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

W. L. L. B.

THE KING *v.* JUSTICES OF THE CENTRAL CRIMINAL COURT.

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Jan. 19, 20.

Ex parte LONDON COUNTY COUNCIL.

Certiorari—Jurisdiction—To Central Criminal Court—To quash Order—Order to pay Honorarium to Officer of Court—Order to pay Super Tax thereon—Validity—Central Criminal Court Act, 1834 (4 & 5 *Will.* 4, *c.* 36), *ss.* 1, 2, 20.

The King's Bench Division of the High Court of Justice has no jurisdiction to issue a writ of certiorari for the purpose of removing into that Court an order of the Central Criminal Court with a view to its being quashed.

Reg. v. *Judges and Justices of the Central Criminal Court* (1883) 11 Q. B. D. 479; *Ex parte Fernandez* (1861) 10 C. B. (N. S.) 3; *Reg.* v. *Boaler* (1892) 67 L. T. 354; and *Skinner* v. *Northallerton County Court Judge* [1898] 2 K. B. 680; [1899] A. C. 439 applied.

Reg. v. *Lee* (1876) 1 Q. B. D. 198 and *Reg.* v. *Brooke* (1894) 59 J. P. 6; 11 Times L. R. 163 explained and distinguished.

An order made by the Central Criminal Court directing that any taxes demanded by the Inland Revenue authorities in respect of an honorarium payable to the clerk of that Court shall be paid by the public bodies by which the salaries of the Court's officials are payable is not valid and not in excess of the powers of the Court under the Central Criminal Court Act, 1834.

ORDER NISI for a writ of certiorari.

By an order dated May 23, 1881, made by the justices and judges of the Central Criminal Court, it was, in pursuance of the Central Criminal Court Act, 1834 (1), ordered that there should be paid to the various officers of the Court, including the clerk of the Court, the salaries and expenses therein mentioned. By an order dated May 6, 1889, made by the said Court, reciting that in consequence of the passing of the Local Government Act, 1888 (1), it had become necessary to determine by whom and in what proportions and manner the said salaries and expenses should be paid, it was in pursuance of the said Act of 1834 (1) ordered that the said

(1) The Central Criminal Court Act, 1834, provides:—

Sect. 1: ". . . . the Lord Mayor for the time being of the City of London, the Lord Chancellor or Lord Keeper of the Great Seal, and all the Judges for the time being of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the Chief Judge and the

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salaries and expenses should until further order be paid by the treasurers of the counties of London, Middlesex, Surrey and Essex in the proportions and by the quarterly payments therein mentioned. By an order dated June 24, 1907, made by the said Court, reciting that the maximum annual sum

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two other Judges in Bankruptcy, the Judge of the Admiralty, the Dean of the Arches, the Aldermen of the City of London, the Recorder, the Common Serjeant, the Judges of the Sheriff's Court of the City of London, for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a Judge of any of His Majesty's Superior Courts of Westminster, together with such others as His Majesty, his heirs and successors, shall from time to time name and appoint by any general commission as hereinafter stated, shall be and be taken to be the Judges of a Court to be called the 'Central Criminal Court,' to which His Majesty, and his heirs and successors, may direct his general commission as herein-after mentioned; and which Court shall have jurisdiction to hear, try, and determine all offences committed or alleged to be committed as herein-after specified."

Sect. 2 provides that His Majesty may issue a commission of oyer and terminer and gaol delivery for London and Middlesex and certain parts of Essex, Kent and Surrey to the said Court.

Sect. 20: ". . . . it shall be lawful for the said Justices and Judges of oyer and terminer and gaol delivery, in sessions assembled, and they are hereby authorized and required, to ascertain, make, and settle a table of fees and allowances to be received and taken by the several officers of the said Court, and from time to time to alter and vary the same as may to them appear just and reasonable, which said table of fees and allowances shall be hung up in the Court of Sessions, and a copy thereof transmitted to the clerks of the peace of the said counties of Middlesex, Essex, Kent and Surrey; or it shall be lawful for the said Justices and Judges to ascertain, make, and settle a salary in lieu of such fees and allowances, to be paid to the said officers or either of them for the performance of their respective duties, as to the said Justices and Judges of oyer and terminer and gaol delivery shall seem reasonable and just, and to order and direct how and in what manner and by whom such fees and allowances or salary shall be paid, and also to order and direct such portion as they shall think fit of the expence of preparing calendars and sessions papers, and of other expences incident to this Act, to be borne and paid by the treasurer of each of the said counties, and such portion shall be paid by such treasurers accordingly: Provided, nevertheless, that the county of Middlesex shall not be liable to any portion of the expence of preparing calendars or sessions papers, or of any other expences incident to this Act, to which the said county would not have been liable in case this Act had not been passed."

Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89: "(1.) The Central Criminal Court Act, 1834, shall be construed as if the County of London were throughout mentioned therein as well as the County of Middlesex."

payable to the clerk of the Court pursuant to the former orders for expenses was no longer adequate, it was ordered that there should be paid quarterly to the said clerk the reasonable expenses of his office, and that the amount of such expenses should be paid by the treasurers of the said counties as therein mentioned.

By an order dated May 16, 1922, made by the said Court, it was ordered " that the sum of 1000*l.* is due to Herbert Austin, clerk of the Court, as an honorarium for certain services rendered to this Court and that the payment of the said sum is a reasonable and necessary expense incident to the statute 4 & 5 Will. 4, c. 36 [the said Act of 1834], and that in pursuance of the said statute the said sum of 1000*l.* be forthwith paid to the said Herbert Austin " by the treasurers of the said counties in the said proportions.

By a second order of the same date, made by the said Court, it was ordered " that any taxes demanded by the Inland Revenue Authorities in respect of the honorarium this day ordered to be paid to Herbert Austin, clerk of this Court, be forthwith paid to the said Herbert Austin " by the treasurers of the said counties in the said proportions, and " that the payment of the said taxes is a reasonable and necessary expense incident to the statute 4 & 5 Will. 4, c. 36."

On March 19, 1924, the London County Council obtained an order nisi calling upon the justices for the jurisdiction of the Central Criminal Court to show cause why a writ of certiorari should not issue directed to them to remove into the King's Bench Division of the High Court of Justice a certain order made by them or some of them at the general session of oyer and terminer and general sessions of the delivery of the lawfully appointed prisons holden for the jurisdiction aforesaid on May 16, 1922, whereby it was ordered [then was set out the second of the above orders of the last-mentioned date]; upon the grounds: (1.) that the said order was made without jurisdiction, was ultra vires and void; (2.) that the statute 4 & 5 Will. 4, c. 36, gave no power to the justices and judges of the said Court to order that any taxes demanded by the Inland Revenue authorities in respect

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of the honorarium ordered to be paid to the clerk of the Court should be paid to the said clerk by the said counties; (3.) that the payment of the said taxes was not an expense incident to the said statute; (4.) that the said statute gave no power to the said justices and judges to order that the said payment was a reasonable and necessary expense incident to the said statute. And the order nisi further stated that it was issued by the London County Council upon notice thereof to be given to the Recorder and the Common Serjeant of the City of London, and to the clerk of the said Court in the meantime. And the order nisi concluded with the statement that upon the hearing of the motion, in the event of the Court making absolute the order for a writ of certiorari, the Court would be asked to order that the order above referred to when returned should be quashed without further order.

Sir Douglas Hogg A.-G. and *H. M. Giveen* showed cause. The order nisi for a writ of certiorari to the Central Criminal Court to bring up the second of the orders made by that Court on May 16, 1922, directing super tax in respect of the honorarium given to the clerk of that Court by the earlier order of that date to be paid to him by the treasurers of the London County Council and the other county councils ought to be discharged.

This Court has no jurisdiction to issue a writ of certiorari to remove an order of the Central Criminal Court with a view to its being quashed. It has always been recognized that a Court of assize is a superior Court, whose proceedings and decisions are not subject to review by this Court: see *Ex parte Fernandez.* (1) The case of *Reg.* v. *Coles* (2) is distinguishable, for there the writ of certiorari was issued not to a Court of assize but to quarter sessions. The case of *Reg.* v. *Lee* (3) is also distinguishable on the ground that there the writ of certiorari did not issue to the assize Court, which had made the order as to costs, but to the private prosecutor in whose

(1) 10 C. B. (N. S.) 3. (2) (1845) 8 Q. B. 75.
(3) 1 Q. B. D. 198.

favour it had been made, and, further, the judge of assize, who was afterwards a member of the Divisional Court which heard the application for the writ, admitted that the order ought not to have been made, and assented to its being brought up to be quashed. In *Reg.* v. *Judges and Justices of the Central Criminal Court* (1) it was laid down that the Central Criminal Court is at least as high a Court as the Court of assize. And the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13, now provides that in every Act the expression "Court of assize" shall include the Central Criminal Court. In *Reg.* v. *Boaler* (2) it was expressly decided that this Court had no jurisdiction to issue a writ of certiorari to the Central Criminal Court to remove a conviction obtained in that Court, for the purpose of having it quashed, and the decision implies that it has no jurisdiction to remove any other order or proceeding of that Court for that purpose. A writ of certiorari issues to bring up a judicial order or proceeding only, and not an administrative order such as that now in question.

The applicants are not aggrieved by the making of the orders in question. If the clerk of the Central Criminal Court had not done the extra work for which the honorarium and the sum in question are payable, the county councils concerned would have had to pay a much larger sum in order to get the work done.

The Central Criminal Court in making the order in question did not act in excess of its statutory jurisdiction. Under the Central Criminal Court Act, 1834, s. 20, that Court has power to settle the fees and allowances, or salaries, to be paid to its officers; and under that section as amended by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 89, sub-s. 1, the amount of these fees and salaries is to be paid by the treasurers of certain counties, including the county of London. The order in question was in substance and effect an order for payment of additional salary. If it had been in form an order for payment to the clerk of a specified sum equal in amount to the tax deducted from the honorarium, it would

(1) 11 Q. B. D. 479. (2) 67 L. T. 354.

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have been a valid order, and the objection taken to it by the London County Council is of a purely technical character. Even if the sum directed to be paid by the order is a gratuity, the order is within the statutory powers of the Central Criminal Court: *Hampson* v. *Price's Patent Candle Co.* (1)

Sir Leslie Scott K.C. (*L. S. Fletcher* with him) in support of the order nisi. The order nisi should be made absolute.

The King's Bench Division of the High Court of Justice has jurisdiction to issue a writ of certiorari to the Central Criminal Court for the purpose of removing an order made by the latter Court. The Court of King's Bench has from the first had an inherent jurisdiction to issue a writ of certiorari to other common law Courts of record, including Courts of oyer and terminer, gaol delivery, and assize, the theory being that the King sat in his Court of King's Bench with his justices and could command that the record or order of any other Court should be brought before him: see Viner's Abridgment, vol. iv., p. 330, tit. "Certiorari," marginal note to that title; Comyns' Digest, tit. "Certiorari" (A. 1.); and Coke's Inst., vol. iv., p. 73. These other Courts, although superior Courts of record for certain purposes, were inferior Courts of record in so far as they were subject to the jurisdiction of the Court of King's Bench to remove their proceedings and orders by certiorari for the purpose, if necessary, of their being quashed: see Bacon's Abridgment, 7th ed., vol. ii., p. 391, tit. "Courts" (D); and Blackstone's Commentaries, 21st ed., vol. iii., p. 41. The Central Criminal Court was constituted by the Central Criminal Court Act, 1834, and it appears from the provisions of that Act that that Court is a Court of oyer and terminer and gaol delivery, and is equivalent to a Court of assize. The Court of King's Bench therefore had, and this Court as its successor now has, jurisdiction to issue a writ of certiorari to the Central Criminal Court to bring up, with a view to quashing it, any order made by the latter Court, including an order made under s. 20 of the Act, even if for the purposes of that section that Court is a superior Court. The original jurisdiction of this Court to supervise

(1) (1876) 34 L. T. 711.

Courts of assize and other superior Courts by certiorari is recognized by the statutes relating to the matter. These statutes do not confer the jurisdiction, which existed at common law, but for the most part they impose restrictions and limitations upon it. Thus the statutes 21 Jac. 1, c. 8, ss. 6, 7; 5 & 6 W. & M. c. 11, s. 2; and 5 & 6 Will. 4, c. 33, ss. 1, 2, with a view to prevent the improper removal of indictments from the locality in which they could best be tried, provided that certiorari should not issue for the removal of indictments, except on motion and leave of the Court, and on a recognisance entered into by the applicant. These Acts clearly imply that this Court had a general jurisdiction to remove the record of a Court of assize, and they have only imposed a restriction upon it as regards indictments. The jurisdiction of this Court over Courts of assize has not been affected by the Judicature Acts. It is true that the Judicature Act, 1873 (36 & 37 Vict. c. 66), provides by s. 3 that the superior Courts of Chancery and common law shall be united and shall constitute one supreme Court; and by s. 5 that all the judges of these Courts shall have equal power. The latter provision however only applies where these judges are exercising jurisdiction under the Act as judges of the supreme Court, and not where they are discharging the duties of judges of assize, to whom certiorari still lies from this Court. The jurisdiction of the Court of King's Bench to remove by certiorari indictments and other criminal proceedings from Courts of oyer and terminer and Courts of assize appears from many decided cases, as, for example, *Reg.* v. *Porter* (1); *Rex* v. *Harrison* (2); *Rex* v. *Clement* (3); *Rex* v. *Wartnaby* (4); and *Reg.* v. *Hawdon.* (5) Where in any of these cases the rule for a certiorari or other process was refused, the ground of the refusal was not that the Court of King's Bench had not jurisdiction, but that the Court in the exercise of its discretion considered that in the circumstances the relief ought not to be granted. In cases where

(1) (1704) 1 Salk. 149.
(2) (1819) 1 Chit. 571.
(3) (1821) 4 B. & Al. 218.
(4) (1835) 2 Ad. & E. 435.
(5) (1841) 9 Dowl. 1007.

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there was jurisdiction to grant the writ the party applying for it was not as a rule entitled to it ex debito justitiae, but the Court in its discretion might refuse it, and in practice probably did refuse it in certain cases, as where the trial had taken place, or where the party had another remedy by way of appeal or otherwise: see *Arthur* v. *Commissioners of Sewers in Yorkshire* (1) and *Reg.* v. *Surrey Justices.* (2)

[ACTON J. Is there not a distinction between the case in which a writ of certiorari is issued for the purpose of removing an indictment or other proceeding from one Court to another with a view to the more convenient arrangement of business, and the case in which the writ is issued for the purpose of bringing up the order of a Court with a view to its being quashed? Does it follow that because the writ issues for the former purpose it issues for the latter purpose also?]

There are no doubt substantial differences between the purposes or objects for which the writ may issue, or for which the record may be removed, but the law recognizes no distinction between different cases as regards the jurisdiction of this Court to issue the writ. That the jurisdiction has not been affected by the Judicature Acts, but continues to exist as regards Courts of assize and the Central Criminal Court, is shown by the cases of *Reg.* v. *Lee* (3); *Reg.* v. *Dudley and Stephens* (4) per Lord Coleridge C.J.; and *Reg.* v. *Brooke* (5) per Wills J. The case of *Skinner* v. *Northallerton County Court Judge* (6) is inapplicable, for in that case this Court refused a writ of certiorari to bring up the order in bankruptcy of a county court judge, who had the powers of a High Court judge, not because it had not jurisdiction, but because there was no occasion for it to exercise its jurisdiction, as the county court judge had not exceeded his powers. It appears from the Crown Office Rules, 1906, that this Court can issue a writ of certiorari to the Central Criminal Court. Rule 269 provides that the forms in the Appendix shall be

(1) (1724) 8 Mod. 331.
(2) (1870) L. R. 5 Q. B. 466.
(3) 1 Q. B. D. 198.
(4) (1884) 14 Q. B. D. 273, 280.
(5) 59 J. P. 6; 11 Times L. R. 163.
(6) [1898] 2 Q. B. 680; [1899] A. C. 439.

used in proceedings on the Crown side of the Court. Form No. 7 is that of a writ of certiorari to remove indictments into the King's Bench Division, and form No. 8 is that of a writ of certiorari to remove an indictment from the Central Criminal Court.

[LORD HEWART C.J. These are statutory forms, and the fact that a statute was required to give this Court jurisdiction to issue the writ in these cases seems to suggest that in the absence of statutory authority it would not have had that jurisdiction.]

The statute is merely declaratory of the common law jurisdiction which existed independently of it. The general jurisdiction of this Court not having been cut down by any statute or decision still exists, and may be exercised over the Central Criminal Court.

Further, even if the Central Criminal Court, when acting as a criminal Court under s. 2 of the Act of 1834, is a superior Court of record to which a writ of certiorari would not issue, it is not, when acting under s. 20, a Court of that character, but an inferior Court of record to which the writ can be issued. The Court when acting under s. 20 is not exercising the powers of a Court of oyer and terminer, but powers of a purely statutory and administrative character as an inferior Court. A Court may be a superior Court for some purposes and an inferior Court for other purposes: see per Palles C.B. in *O'Brien* v. *The Queen*. (1)

The applicants, the London County Council, are persons aggrieved by the making of the order in question. The order directs that the taxes payable in respect of the honorarium shall be paid by the several county councils concerned, though these bodies had no voice in the making of the order and no control over the official receiving the money. The order is for payment of taxes in respect of an honorarium given for a particular year, but the burden may fall upon the ratepayers of the counties for a later year, a result which would be unfair and should not be allowed: *Reg.* v. *Saunders*. (2)

The Central Criminal Court in making the order in question

(1) (1890) 26 L. R. Ir. 451, 521. (2) (1854) 3 E. & B. 763, 777.

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acted in excess of its powers under s. 20 of the Act of 1834. That section only empowers that Court to settle the fees or salary payable to the officers of the Court for work done under their contracts of service. The order in question directs, not payment of salary to the clerk of the Court, but the making to him of a gift or gratuity.

In these circumstances the applicants are entitled ex debito justitiae to a writ of certiorari for the removal of the order for the purpose of quashing it.

LORD HEWART C.J. This is an order nisi for a writ of certiorari directed to the justices for the jurisdiction of the Central Criminal Court for the removal into this Court of a certain order made by them or some of them on May 16, 1922. [His Lordship read the order nisi, including the grounds on which it was obtained and the conclusion thereof, and continued:] It is not necessary to recapitulate in detail the facts of this case, which have been fully explored in argument. It is, I think, enough to say that in pursuance of the Central Criminal Court Act, 1834, to which I shall presently again refer, as subsequently amended, the salaries and expenses of the Court were ordered to be paid as to a certain proportion of them by the treasurer of the county of London. On May 16, 1922, two orders were made by the justices and judges of the Central Criminal Court, the first of which was an order for the payment to Sir Herbert Austin, a distinguished public servant, who among other things is clerk to the Central Criminal Court, of what was therein described as an honorarium for services rendered, and the second of which was an order closely following upon the first, and providing in effect that the honorarium referred to should be paid free of income tax and super tax. It is said on behalf of the London County Council that the second of these orders was made without jurisdiction, that it was ultra vires and void, and that accordingly it ought to be brought into this Court by certiorari and forthwith quashed.

The first question which arises is whether in such a case as this a writ of certiorari lies. This order nisi is directed

to the justices for the jurisdiction of the Central Criminal Court. Who are they? In order to answer that question one has to look at the Act of 1834. Sect. 1 of the Act provides: ". . . . the Lord Mayor for the time being of the City of London, the Lord Chancellor or Lord Keeper of the great seal, and all the Judges for the time being of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the Chief Judge and the two other Judges in Bankruptcy, the Judge of the Admiralty, the Dean of the Arches, the Aldermen of the City of London, the Recorder, the Common Serjeant, the Judges of the Sheriffs Court of the City of London, for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a Judge of any of His Majesty's Superior Courts of Westminster, together with such others as His Majesty, his heirs and successors, shall from time to time name and appoint by any general commission as herein-after stated, shall be and be taken to be the Judges of a Court to be called the 'Central Criminal Court,' to which His Majesty, and his heirs and successors, may direct his general commission as herein-after mentioned; . . . ." Sect. 20 provided that it should be lawful for the said justices and judges to settle a table of fees and allowances to be received by the officers of the said Court, or a salary in lieu of such fees and allowances, and to order such portion as they should think fit of the expenses incident to the Act to be paid by the treasurers of certain counties, including Middlesex; and, later, the Local Government Act, 1888, s. 89, sub-s. 1, provided that the Act of 1834 should be construed as if the county of London were throughout mentioned therein as well as the county of Middlesex. That then is the Court to which it is urged that a writ of certiorari should be issued by this Court. In other words, it is said that the well known remedy for removing into the King's Bench Division an order made by an inferior Court is a remedy which is applicable to the Central Criminal Court. In my opinion, not only is there no authority for that proposition, but all the authority which one can find is in the opposite direction.

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The first case to which I may refer is *Reg.* v. *Judges and Justices of the Central Criminal Court.* (1) There it was held that mandamus would not lie to the judges and justices of the Central Criminal Court. In the course of the argument in that case Pollock B. said: "The Central Criminal Court is at least as high a Court as the Court of Assize." (2) Again, in giving judgment, he said: "It being thought convenient that prisoners charged with offences of a graver character committed in the city and in the county of Middlesex should be tried there"—that is at the Central Criminal Court—"commissions were from time to time issued by the Crown to those justices and to the judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, and also to the judge of the Admiralty Court because cases of piracy and other crimes committed on the high seas could be most conveniently tried there. In 1834 was passed the Act under which the Central Criminal Court now sits." (3) The learned baron proceeded to refer to the terms of s. 1 of that statute, and he went on to say: "I find nothing in the Act to show that, when the Central Criminal Court sits to try cases of treason or murder it sits in any other capacity than if it sits for the trial of any ordinary crime. It seems to me, therefore, that the Court before whom the prisoner in the present case was tried was sitting as a superior Court, of at least as high authority as justices of assize sitting under a commission of oyer and terminer and gaol delivery on circuit. There being no precedent to be found of this Court—the highest common law Court of criminal jurisdiction—ever having issued a mandamus to a superior Court, which the Central Criminal Court clearly is, it is enough for me to say that this rule must be discharged." Manisty J. delivered judgment to the same effect, and, having quoted a passage relating to Courts of assize from the well known judgment of Willes J. in a case to which I will refer presently, he added: "That equally applies to the judges and justices of the Central Criminal Court." That decision was given in 1883.

(1) 11 Q. B. D. 479. (2) Ibid. 481.
(3) Ibid. 483.

I turn to a case referred to in the last case—namely, the case of *Ex parte Fernandez*. (1) In that case during a trial at assizes a witness had been committed by the presiding judge for contempt of Court, and it was held, on an application for a habeas corpus to bring up the witness, that the Court of assize being a superior Court, the judge had jurisdiction to commit and was not bound to set out at length in his warrant the cause of commitment, inasmuch as his decision was not subject to review by the Court above. Willes J., in delivering judgment, after considering the authorities, said: "It thus appears to me very clearly, whether I consider the origin, the history, the procedure, or the jurisdiction of the Court of assize, or the estimation in which it has ever been held, that I must class it as a superior Court of a high order. Mr. Bovill has not cited a single authority or even hint to the contrary." (2) A little later the learned judge, speaking of judges of assize, said: "They belonged to that superior class to which credit is given by other Courts for acting within their jurisdiction, and to whose proceedings the presumption omnia rite esse acta applies equally as to those of the supreme Court of Parliament itself. Lord Chief Baron Gilbert lays down that 'these were superior Courts within their jurisdiction in as ample a manner as a Court of Westminster.'" (3) That was a decision in 1861.

To come to more recent times, in *Reg.* v. *Boaler* (4), in 1892, an application had been made for a writ of certiorari directed to the Central Criminal Court to bring up a conviction for the purpose of quashing it. The case was argued before Lord Coleridge C.J. and Cave J., and the former in giving judgment said: "I think we cannot grant this rule on two grounds, either of which is sufficient, and both of which make it impossible for us to grant it. First, there is no authority for saying that this writ can go at all to the Central Criminal Court, which is a superior Court. It is a Court at least as high as the Assizes, as the criminal Court on the circuit; and it has been held expressly with regard to those Courts, that

(1) 10 C. B. (N. S.) 3.
(2) Ibid. 55.
(3) 10 C. B. (N. S.) 56.
(4) 67 L. T. 354.

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no certiorari will go to bring up a conviction obtained at the Assizes, for the purpose of being quashed here." In like manner Cave J. said: "No instance of a writ of certiorari directed to the Central Criminal Court to bring up a conviction to quash it can be found. There is not even any evidence that anything of the kind has been done at Quarter Sessions."

In the year 1898 in *Skinner* v. *Northallerton County Court Judge* (1) the question was further considered. In that case the Queen's Bench Division had discharged a rule nisi for the issue of a writ of certiorari to bring up an order of the county court judge at Northallerton sitting in Bankruptcy, and on appeal, Vaughan Williams L.J. in his judgment said: "The cases in which a certiorari has gone to bring up the order of an inferior Court exceeding its jurisdiction, even where a certiorari has been taken away by statute, do not seem to me to touch the present case, because the basis of the decision in *In re New Par Consols* (*No.* 2) (2) was that the judge of the county court exercising jurisdiction in a matter in which the statute gave him seisin was not an inferior Court, because in such a matter the statute gave him all the powers of a judge of the High Court." (3) A little later on he said: "A judge of the High Court in the exercise of his jurisdiction cannot be controlled by writs of prohibition or certiorari, but only by appeal; and if the county court judge in the exercise of bankruptcy jurisdiction is, as would seem to be the case from the decision in *In re New Par Consols* (*No.* 2) (2), placed on an equal footing, he is judge of law and fact, and his judgments are subject to appeal only, and cannot be reviewed by certiorari." (3)

To put these judgments together and to consider them in the light of s. 16 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), one may express the conclusion which they support in this way: judges of assize exercise powers upon the same plane with the powers exercised by judges of the High Court in that Court; the Central Criminal Court is a Court of not less

(1) [1898] 2 Q. B. 680; affirmed [1899] A. C. 439.

(2) [1898] 1 Q. B. 669.

(3) [1898] 2 Q. B. 686.

authority than a Court of assize; the Central Criminal Court is, therefore, a superior Court, and a writ of certiorari from the King's Bench Division does not lie to it for the purpose of quashing its order.

Reference has been made to a particular case which, it is suggested, affords an exception to the universal proposition that no authority is to be found for that which is sought to be done here, that case being *Reg.* v. *Lee.* (1) When that case is considered, however, it is not difficult to see why it exists in the isolation in which it is found. In that case an information had been laid by one Robert Lee charging that a certain highway was out of repair, and a summons against the surveyors of highways of the district requiring them to answer the information had been heard. The surveyors denied the liability to repair. Thereupon the justices acting under s. 95 of the Highways Act, 1835 (5 & 6 Will. 4, c. 50), directed an indictment to be preferred at the assizes against the inhabitants for permitting the highway to be out of repair. The indictment was preferred accordingly, and the trial came on before Field J. The learned judge expressed the opinion that there was no evidence of obligation to repair the way as a highway for carts and carriages, but he ordered the indictment to be amended by limiting it to a horseway, and on the indictment so amended a verdict of guilty was entered. Afterwards application was made by the prosecutor, Lee, for an order under the last mentioned section for payment of the costs of the prosecution, and Field J. " deeming himself bound by the terms of the section, made the order." That having been done a rule was granted by the High Court calling upon—not Field J.—not anybody in a position analogous to that of the justices for the jurisdiction of the Central Criminal Court in the present case—but Mr. Robert Lee, to show cause why a writ of certiorari should not issue to bring up that order about costs for the purpose of quashing it. The rule came on for argument, as it happened—and one cannot think that it was a mere accident—before a Court of which Field J. was himself a member. No point was raised about

(1) 1 Q. B. D. 198.

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jurisdiction, but Field J. said: "I made the order reluctantly, but thought myself compelled by the statute. I am now satisfied that I was wrong, and I think also that this decision will do substantial justice." (1) In other words the learned judge was satisfied that he had made a slip in making the order as to costs, and he was nothing loth that a writ of certiorari should issue, the writ being directed to Robert Lee, the prosecutor, to bring up that order that it might be quashed. From beginning to end not one word was said upon the one side or the other as to the jurisdiction of the Court to issue a writ of certiorari in such circumstances. In my opinion that case is to be regarded strictly in relation to its particular facts, and it affords no authority whatever for the proposition that is urged in this case on the part of those who support the rule.

With regard to the main question in the case it only remains to add that various inquiries, no doubt of no little historical interest, have been stirred in argument. I shall not enter into these inquiries because, with due respect, they seem to me to throw little light upon the immediate question. I think it right, however, to remark that a clear distinction is to be drawn between two matters, on the one hand the removal, by means of certiorari, of indictments or presentments in order to bring about what may be called the domestic or internal arrangement or rearrangement of business, and on the other hand the removal for the purpose of quashing it of an order which has been made by a superior Court. In other words, in my opinion, the statutes and decisions in regard to mere change of venue are not upon the same plane with a proposal to bring from a superior Court an order which has been made by that Court for the purpose of quashing it. In the one case the superior Court is making for good reason a useful redisposition of its business: in the other case the superior Court is invited to quash that which itself has done, and the process involves the rather ludicrous position that it calls upon judges to show cause to themselves why they should not be directed to remove, so that it may be quashed,

(1) 1 Q. B. D. 200.

something which they themselves have determined. In my opinion the beginning of the truth about this matter is to distinguish the things which ought to be distinguished. There is no authority for the proposition with which those who seek to support this order nisi must begin—namely, that in a case of this kind there is jurisdiction in this Court to issue a writ of certiorari.

I will refer in a sentence or two only to an additional argument, which was urged in support of the order nisi—namely, that the justices and judges of the Central Criminal Court, in making the order here complained of, were acting in excess of their jurisdiction. To my mind there is no foundation for that criticism. By the Central Criminal Court Act, 1834, s. 20, power is given to the Central Criminal Court to do certain acts in relation to the salaries and emoluments of its officers. By the order now complained of, that Court, as the appropriate authority seeking only to give full and proper effect to another order earlier in point of time and not here complained of, was acting within its powers in regard to these matters. It is not necessary to enter into the merits of the case. What is apparent is that these justices, being minded to recognize adequately the exceptional services of a distinguished public officer, awarded him a sum of money, which was essentially in the nature of a temporary increase of salary, and having made that award, took care to give full effect to their intention by providing that the payment should be tax free. It has been conceded in argument that if the order for payment of the tax had directed payment of the amount under the name of "salary," no question of excess of jurisdiction could have arisen, but because of the particular form in which the order happened to be expressed it is said that there was an excess of jurisdiction. I refer to that matter only incidentally and because it has been developed at some length on behalf of the London County Council, who feel, and no doubt feel strongly, that in matters of this kind they are in the position of persons labouring under the grievance of taxation without representation. Their real complaint is against the provisions of the

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relevant statutes. That grievance does not warrant, and certainly it cannot carry to success, a complaint made about an act done within the jurisdiction which those statutes confer. The real point of this case, however, is not that, but is the fundamental question of law with which I have already dealt.

For these reasons the order nisi ought, I think, to be discharged.

AVORY J. I concur in the judgment which has been delivered by my Lord. Inasmuch, however, as the argument presented to us by Sir Leslie Scott raises a question concerning the general jurisdiction of this Court, I will add a few words expressive of my own view, even at the risk of repeating to some extent what has been already much better expressed.

The extent and nature of the writ of certiorari is, I think, properly expressed in Short and Mellor's Crown Office Practice, 1st ed., pp. 14, 89, as follows: "The writ of certiorari is the process by which the Queen's Bench Division in the exercise of its superintending power over inferior jurisdictions, requires the judges or officers of such jurisdictions to certify or send proceedings before them into the Queen's Bench Division, whether for the purpose of examining into the legality of such proceedings, or for giving fuller or more satisfactory effect to them than could be done by the Court below." That proposition, I understand, is not disputed by Sir Leslie Scott, but he says either that the Central Criminal Court is an inferior Court within the meaning of that rule, or, if it is not for all purposes an inferior Court, that for the purpose of exercising its jurisdiction under s. 20 of the Act of 1834 it is an inferior Court, which is subject to the overriding jurisdiction of this Court. At first sight one would say that it cannot be correct to assert that any Court can issue a writ of certiorari directed to itself to quash an order made by itself. That, however, is what the proposition advanced in support of this motion comes to. All the judges of this Court are judges of the Central Criminal Court, who by s. 2 of the Act of 1834 are to "use and exercise all powers

and authorities belonging to Justices of oyer and terminer and gaol delivery." The order in question, because it is an order of the Central Criminal Court, must, therefore, be presumed to be made by judges of this Court. It matters not by which two particular judges the order is signed, for being an order of the Central Criminal Court it is in effect an order of the judges of this Court.

Sir Leslie Scott has cited statutes and text-books for the purpose of showing that this writ of certiorari will lie to judges of assize. He has quoted Viner's Abridgment, Comyns' Digest and Coke's Institutes, and he might also have added on this point Bacon's Abridgment and Hawkins' Pleas of the Crown. These authorities are all to the same effect, and at first sight they appear to support the proposition that a writ of certiorari may go to a judge of assize. Upon that point I would like to refer again to the judgment of Willes J. in *Ex parte Fernandez* (1), part of which has been already read, in which he said: "The result is, that, historically, the Courts of assize, as being Courts of general jurisdiction in all criminal cases, and having power to try all issues of fact of whatever importance arising in the several counties on their circuits, to which, therefore, every man is indebted in a greater or less degree for the protection of his property, his liberty, and his life, do stand in the place of the ancient iters of the justices itinerant, and are a superior Court, so to speak, by succession; . . . ." (2) Then there is the passage quoted this morning from Bacon's Abridgment, tit. "Courts" (D), where the author is distinguishing between Courts of record, which are divided into such as are supreme, superior or inferior, and, after referring to the supreme Court of the kingdom, which is the High Court of Parliament, then goes on to say: "Superior Courts of record are again, those that are more principal or less principal; the more principal ones are the Lords' House in Parliament, the Chancery, King's Bench, Common Pleas, and Exchequer; and by Hale, such are justices itinerant ad communia placita and ad placita forestae." So that, according to Hale, the

(1) 10 C. B. (N. S.) 3. (2) Ibid. 49.

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justices itinerant are a superior Court of record within the definition given by Bacon, and if in continuance of that passage the judgment of Willes J. be taken, there can be no question that a Court of assize is a superior Court of record, and that its decisions are not subject to review by this Court. The Central Criminal Court is clearly a Court of assize and therefore is a superior Court of record, to which, in my opinion, this Court cannot possibly grant a writ of certiorari.

I will refer briefly to one or two of the cases which have been relied upon. I need not mention again the case of *Reg.* v. *Lee* (1), which has been fully explained by my Lord. I find, however, that the case of *Skinner* v. *Northallerton County Court Judge* (2) went to the House of Lords on appeal, and there are some observations of Lord Halsbury L.C. on that case which are worth noting. In expressing his opinion he said: "My Lords, it seems to me that this is a very plain case, and I am somewhat surprised that it should have been brought here, because it seems to me that the judgments below are perfectly satisfactory, and depend upon very plain principles." (3) Then, after pointing out that in respect of bankruptcy the statute has given all the powers and jurisdiction which the High Court possesses to the county court judge sitting in bankruptcy, he goes on to say: "Now, this county court judge was sitting in bankruptcy, and the confusion which is imported into it is that because, as I will assume for the moment, the judge issued a warrant which in form was wrong, but could have been put right, therefore it could have been put right, not in the Court in which it was issued, but in the High Court. The absurdity of that is that the statute itself has made the county court the High Court for this purpose." (4) Then he said that the judgment of A. L. Smith L.J. put the matter perfectly clearly, and that he had no desire to add anything to it. Lords Macnaghten, Morris, Shand and Brampton concurred in that expression of opinion. One other case, which calls for

(1) 1 Q. B. D. 198.
(2) [1898] 2 K. B. 680; [1899] A. C. 439.
(3) [1898] 2 K. B. 680; [1899[A. C. 440.
(4) Ibid. 441.

comment, is *Reg.* v. *Brooke*. (1) That case was relied upon by Sir Leslie Scott as an authority for the proposition that this Court would grant a writ of certiorari to a judge of assize. When it is considered, however, I think it will be found that it is no authority for any such proposition. There a defendant, prosecuted for libel, had been bound over by recognisance to keep the peace. He had broken the peace, and the proceeding in the case was for the purpose of enforcing the recognisance under a rule of the Crown Office, which provided that "Whenever it has been made to appear to the Court or a Judge that a party has made default in performing the condition of any recognisance into which he has entered, filed in the Crown office, the Court or Judge upon notice to the defendant and his sureties, if any, may order such recognisance to be estreated into the Exchequer without issuing any writ of scire facias." It is true that in that case Wills J., in giving judgment, said: "We have jurisdiction to grant a certiorari." In making that observation, however, he only meant that the Court had jurisdiction to grant the writ for the purpose of bringing up that recognisance in order that it might be enforced. The procedure which was followed in that case was, in my opinion, precisely similar in effect to the procedure under which indictments have been in the past, and still are, removed by certiorari into this Court; and those statutes and those cases which regulate the removal of indictments have, in my view, no bearing on the question whether a superior Court of record can issue a certiorari to another superior Court of record to quash an order which has been made by that Court.

The further point was taken by Sir Leslie Scott, that even if the Central Criminal Court is a superior Court of record when it is exercising jurisdiction under s. 2 of the Act of 1834 for the purposes of that section, it ceases to be a Court of that description when it is exercising jurisdiction under s. 20 of that Act. I confess I am unable to appreciate how a Court can for one purpose be a superior Court of record and for another purpose when acting under the same statute

(1) 59 J. P. 6; 11 Times L. R. 163.

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be an inferior Court of record. Supposing, however, that there were any foundation for that view, I concur entirely in the reasons given by my Lord for saying that the order of the Central Criminal Court now in question, which was made under s. 20, was not made in excess of the jurisdiction of the Court.

On these grounds I agree that this order nisi should be discharged.

ACTON J. I am of the same opinion, and I have nothing to add.

Order nisi discharged.

For the justices of the Central Criminal Court: *The Treasury Solicitor.*

For the London County Council: *D. P. Andrews.*

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Feb. 10.

[IN THE COURT OF APPEAL.]

MOAKES *v.* BLACKWELL COLLIERY COMPANY, LIMITED.

Workmen's Compensation—Accident—Weekly Payments—Death of Workman—Deduction of Payments made during Lifetime—Statutory Minimum payable to Dependants—Accident before and Death after January 1, 1924—*Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2—*Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., para.* 1 (*a*) (*i*)—*Workmen's Compensation Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *ss.* 2, 24, *sub-s.* 2, *s.* 30.

By the Workmen's Compensation Act, 1923, s. 2, provision is made for an increase of the amount of compensation payable on the death of a workman who leaves children.

By s. 24, sub-s. 2: "No deduction shall be made under para. 1 (*a*) (*i*) of the First Schedule to the principal Act, as amended by s. 2 of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said s. 2, nor so as to reduce the amount payable under the principal Act below 200*l.*"

By s. 30: "The provisions of ss. 2 to 10 of this Act and of the amendments of any scheme made in pursuance thereof shall not apply to any

case where the accident happened before the commencement of this Act."

On October 29, 1920, the workman met with an accident whilst working in the employers' colliery. The employers paid him 1*l.* a week, together with certain war additions, up to December 31, 1923. After January 1, 1924, they paid him 35*s.* a week, in accordance with the Workmen's Compensation Act, 1923, which had then come into operation. On April 12, 1924, the workman died, death being due to the injury. The total amount which the employers had paid him up to the date of his death was 204*l.* 5*s.* The total amount which his dependants at that date would have been entitled to receive under Sch. I., para. 1 (*a*) (*i*), of the Workmen's Compensation Act, 1906, if that Act had been unaffected by any subsequent legislation, would have been the difference between 300*l.* and the 204*l.* 5*s.*, which had been paid to the workman during his life—namely, a total balance of 95*l.* 15*s.* The employers, after arbitration proceedings had been commenced by the dependants in the county court, paid the sum of 95*l.* 15*s.* into court and denied that they were under any further liability. The county court judge held that, having regard to the sections and the effect of the Act of 1923, the employers were liable to pay a sum of not less than 200*l.* to the dependants, and he made an award to that effect. On appeal:—

Held, that s. 24, sub-s. 2, of the Act of 1923 did not apply to cases where the accident happened before the date of the commencement of that Act, and that the employers were therefore entitled to make the deductions in accordance with the system which obtained before that date.

Held, therefore, that the case must be remitted to the county court judge to make a formal award of the sum paid into court by the employers.

APPEAL from an award of the judge of the Alfreton County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The following statement of facts is taken from the judgment of the Master of the Rolls :—

"It appears that on October 29, 1920, there was an accident to the workman, who was employed by the Blackwell Colliery Company, and they paid him a sum of 1*l.* a week, the sum which was due to him; at least, it is admitted to be that, although there were certain war additions up to December 31, 1923. After January 1, 1924, they paid him 35*s.* a week, in accordance with the Act of 1923, which had then come into force. He died on April 12, 1924, death being due to the injury, and the total sum which the respondents had paid him at the date of his death was 204*l.* 5*s.* The total amount which the dependants would be entitled

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to receive if the Act of 1906 had remained unaffected by any subsequent legislation would have been the difference between the sum of 300*l.* and this 204*l.* 5*s.* which had been paid to the workman during his life, that is to say, a total balance of 95*l.* 15*s.* The respondents, when the matter was brought before the Court, paid the sum of 95*l.* 15*s.* into court, and denied that there was any further liability on their part. The learned judge, having regard to the sections and the effect of the Act of 1923, held that the respondents were liable to pay a sum of not less than 200*l.* to the dependants, and he made an award to that effect."

The respondents appealed. The appeal was heard on February 10, 1925.

Shakespeare for the appellants.

Paley Scott and *F. J. O. Coddington* for the respondents.

The arguments sufficiently appear from the judgments.

[*Costello* v. *Brown* (1); *Tucker* v. *Oldbury Urban Council* (2); and Interpretation Act, 1889, s. 38, sub-s. 2, were referred to.]

POLLOCK M.R. This is an appeal from a decision of His Honour Judge Newell, sitting at the county court of Derbyshire at Alfreton, whereby he decided that the respondents, the Blackwell Colliery Company, Ld., were not entitled to make a full deduction from their liability, to which they contended they were entitled. The learned judge gave his judgment with some hesitation, and we have had the advantage of a more careful argument than it was probably possible for him to have in the business of his court; and I have come to the conclusion that the learned county court judge misinterpreted the section which falls to be interpreted. The facts are quite short. [His Lordship stated the facts as above set out and continued:] The matter stands in this way. Under the Act of 1906 compensation is given to a workman for injury by accident arising out of and in the course of his employment; and the amount which he is to receive is settled by Sch. I., which

(1) (1924) 17 B. W. C. C. 136. (2) [1912] 2 K. B. 317.

provides that the amount of compensation shall be : (*a*) Where death results from the injury, (1.) a certain sum payable to the dependants ; or, (2.) if he does not leave any persons wholly dependent, but leaves partial dependants, then the matter is dealt with in another way ; and, (3.) a sum for his funeral. Then (*b*) Where total or partial incapacity for work results from the injury, a different scale is provided. But in all those three cases, whether death or partial or total incapacity supervenes, it is from the injury that the right to compensation arises. If the Act had remained as it stood, without alteration, under the Workmen's Compensation Act, 1906, by Sch. I. (*a*), the proviso would have come into operation, providing that the amount of any weekly payments made under the Act should be deducted from such sum, that is from such sum which is payable to the dependants ; and, following out the arithmetic which I have already given, the amount of balance which would have remained payable as estimated under Sch. I. (*a*) (*i*) of the Act of 1906 would have been 95*l.* 15*s.*, and no more. But the Workmen's Compensation Act, 1923, has been passed, and it has affected certain sections of the Act of 1906. It has provided in s. 2 for an increase of the amount payable on the death of the workman where the workman leaves children. A complicated system is laid down, whereby the amount to which they are to be entitled is to be ascertained. By s. 24 of the Act certain minor amendments of the Act of 1906 are made, and the second one in sub-s. 2 is as follows : " No deduction shall be made under paragraph (1.) (*a*) (*i*) of the First Schedule to the principal Act, as amended by section two of this Act, in respect of the amount of any weekly payments made under the principal Act, so as to reduce the sum payable in respect of the children of the workman under the said section two, nor so as to reduce the amount payable under the principal Act below two hundred pounds."

It is said that sub-s. 2 may be treated as being divided into two limbs, the first having relation to the deduction made in respect of para. 1 (*a*) (*i*) of Sch. I., as amended by s. 2 of this Act, and the other limb dealing with a reduction

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of the amounts payable under the principal Act, and that, reading the second limb independently of the earlier portions of sub-s. 2, it may be held that under the principal Act no estimation of weekly payments is to be made so as to reduce the sum payable to the dependants below 200*l*. The learned county court judge has held that that was the right interpretation; and that the last portion of sub-s. 2 could be so divided and treated as applicable to the schedule, para. 1 (*a*) (*i*), and that it prevented the sum payable to the dependants being reduced by the estimation of the weekly payments below 200*l*. But s. 24, sub-s. 2, must be considered with this relevant fact, that by s. 30 of the Act of 1923 it is provided that s. 2 of the Act is not to apply to any case where the accident happened before the commencement of this Act.

In the present case the accident did happen before the commencement of this Act; so that the provisions of s. 2 of the Act of 1923 do not apply to it; and when one gets to the minor amendments which are referred to in s. 24 of the Act of 1923, one is dealing with para. 1 (*a*) (*i*) of Sch. I. to the principal Act, as amended by s. 2 of this Act—a section which does not operate in respect of, or to alter, the position or the amount of compensation which is payable in respect of an accident which happened before the commencement of the Act of 1923.

It is said by Mr. Shakespeare that, when sub-s. 2 of s. 24 is looked at and effect given to the fact that s. 2 is not to have any operation upon accidents or the payment of compensation arising out of accidents which happened before the passing of this Act, a portion of sub-s. 2 of s. 24 cannot be severed and given an independent effective operation so as to alter the relations which existed and have existed right up to the time when the Act of 1923 came into operation. He says that when the accident occurred and the payments began to be made, indeed from 1920 onwards, there was in effect a right on the part of the Blackwell Colliery Company, who were making their weekly payments, to take note of the fact that if the workman unhappily died they would be entitled to credit for the sums which they were paying him at

that time week by week, that if the suggested effect is given to the last limb of s. 24, sub-s. 2, of the Act of 1923, the Court is nullifying the section which has been in operation for two or three years, and that ought not to be done without clear words. He has also called our attention to s. 38 of the Interpretation Act, 1889, which I think, without saying more, appears to show that prima facie the Court ought not to construe an Act of Parliament as interfering with a right or privilege or liability acquired or incurred unless it is clear that a contrary intention was indicated in the new statute.

After careful consideration of the argument presented here, it appears to me that sub-s. 2 of s. 24 is, by virtue of s. 30, not to have its operation upon the case of an accident which happened before the commencement of this Act; and, if that be so, then the deductions which are to be made must be estimated according to the system which obtained before the Act of 1923 came into operation. Upon that ground I am of opinion that the learned judge came to a wrong conclusion, and that the appeal ought to be allowed with costs. The award ought to be made that there is no liability on the part of the respondents beyond the amount admitted by them, and in respect of which they have made the payment into Court.

SCRUTTON L.J. I agree, and I add anything of my own only because we are differing from a very carefully worded judgment of the county court judge and because I myself have felt some doubt in the course of the argument, and I do not regard the point as an easy one.

The workman met with the accident in October, 1920, and by reason of that accident the employers incurred a liability, if the workman died in consequence of the accident, to pay his dependants a sum which in certain events was limited to 150*l.*, in certain events funeral expenses not exceeding 10*l.*, with a right to deduct from the sum that they had to pay the dependants the weekly payments made under the Act. On January 1, 1924, the Act of 1923 came into force, and that Act undoubtedly in certain events altered

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the liability from 150*l.* to 200*l.*, and altered the funeral expenses from 10*l.* to 15*l.*, and provided that the deduction to be made from the amount for weekly payments should not reduce the amount payable under the principal Act below 200*l.* So that if that Act of 1923 applied to the accident of 1920, the liability of the employers was increased in those three respects.

The question is whether in this case the provisions of s. 24, which deal with the deduction of weekly payments, apply to an accident which happens before the coming into effect of the 1923 Act. Now it appears to me that when an Act of Parliament not using the word "repealed" contains a provision which alters the provisions of a previous Act it repeals that provision. It is not necessary that the word "repeal" should be used, or that the Act repealed should be in the schedule to the second Act. You may easily have a repeal which is not made by using the word "repeal" and is not effected by putting the Act into shape. It seems to me that when 150*l.* was altered to 200*l.*, when 10*l.* was altered to 15*l.*, and when the provision was inserted that you might not deduct weekly payments so as to reduce the total sum payable to dependants below 200*l.*, you were repealing three provisions of the 1906 Act. If you were repealing them, you start, in construction, with the provision of the Interpretation Act, 1889, that unless the contrary intention appears the repeal of the previous Act will not affect any right, privilege or obligation or liability acquired, accrued or incurred under any enactment so repealed. And it seems to me that when the accident happened the employers incurred a liability by reason of the provisions of the Act if certain subsequent events happened, and that liability would be altered if the 1923 Act applied to that section and the death following it.

One approaches s. 24 with the presumption that it is not intended to alter the liability under the previous Act; and is there any evidence of a contrary intention? As far as I can see, the only things suggested to be evidence of a contrary intention are that s. 30 of the Act says expressly that the provisions of ss. 2 to 10 shall not apply to any case where

the accident happened before the commencement of the Act, and the fact that there is in s. 15 a reference to a weekly payment payable in respect of an injury by an accident happening after the commencement of this Act. And it is said that because the matter is twice dealt with expressly, it must be inferred in cases where the matter is not expressly dealt with that the Act was intended to apply to all accidents. I do not think that that is sufficient to destroy the presumption under the Interpretation Act, 1889, particularly when in s. 24, the particular section we are considering, it is clear that the first part of that section has gone by reason of s. 30, because s. 2 of the Act of 1923 has no application. I am unable to say, and Mr. Scott, to whom I am indebted for his able and frank argument, was also unable to suggest, why a distinction should be made by the Legislature between the payments to children and the reduction of the principal sum below 200*l*.

I think the point is a difficult one, and I felt some doubt during the argument. For these reasons I agree with the judgment proposed, and think that the provisions of s. 24, sub-s. 2, do not apply to accidents which happened before the coming into effect of the Act of 1923.

SARGANT L.J. This difficult case has been well argued. I have come to the same conclusion. The first point which was made by Mr. Shakespeare, and it was a very strong one, was that as regards the first branch of sub-s. 2 of s. 24 that branch must obviously apply only to future accidents, because it applies to s. 2 of the same Act, and s. 2 is expressly limited to accidents occurring after the Act, and it would be an odd construction if, without there being any words pointing out a difference, the second branch of sub-s. 2 should apply not only to accidents happening after the passing of the Act, but to accidents happening before the passing of the Act. Further, there is this consideration, namely that, whether under the Interpretation Act, 1889, because there is a repeal of a previous enactment, or under the considerations generally applicable to the construction of written documents, there is a presumption

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against giving to a document the effect of altering a vested right unless such an alteration is clearly indicated in the document. Here it seems to me that employers who had been making these weekly payments and who had been protected down to the point of the Act from having to pay more than the balance left of the 300*l.* after giving credit for the weekly payments, had a vested right not to be deprived of the benefit of those weekly payments or have that ultimate balance increased to their detriment. As against that, the principal argument was this, that a contrary intention was in fact indicated or shown by the Act, because there was an express provision in s. 30 as to ss. 2 to 10 not applying to past accidents, and therefore there was a rebuttal of the contrary intention and a sufficient indication that the Act, except with regard to those two sections, was to apply to past accidents as well as future accidents. In my opinion, that is not sufficient. The fact that particular sections of the Act have been expressly excluded from applying to past accidents is not sufficient in itself to displace the contrary intention to which I have already referred with regard to the other sections, the sections generally of the Act. And, even if that were sufficient to displace or countervail the contrary intention under the Interpretation Act or under the general construction of written documents, it does not seem to me sufficient to displace the first argument of Mr. Shakespeare—namely, that inasmuch as the first branch of s. 24, sub-s. 2, only applies to future accidents, so a similar limitation must be given to the second branch of sub-s. 2 also.

I agree that the appeal should be allowed.

POLLOCK M.R. The case will be remitted to the learned judge in order that he may make a formal award of the sum paid into Court by the appellants.

Appeal allowed.

Solicitors for appellants: *Peacock & Goddard, for Elliott, Smith & Co., Mansfield.*

Solicitors for respondents: *King, Wigg & Brightman, for Bertram Mather & Co., Chesterfield.*

W. I. C.

[IN THE COURT OF APPEAL.]

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PAILIN *v.* NORTHERN EMPLOYERS' MUTUAL INDEMNITY COMPANY, LIMITED.

Workmen's Compensation—Accident—Employer Company Member of Mutual Indemnity Company—Determination of Membership—Subsequent winding up of Employer Company—Articles of Association of Indemnity Company—Construction—Contract, whether One of Insurance—Statutory Subrogation of Workman—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 5, *sub-s.* 1.

The N. E. M. Indemnity Company was a company established for the mutual insurance of its members against two classes of accidents happening in their mines—(1.) extraordinary accidents, i.e.—accidents resulting in death, and (2.) ordinary accidents. The articles of association provided for the establishment of an ordinary accident fund and for the keeping of an ordinary accident account as to each member. All sums paid by the company for compensation or indemnity in respect of ordinary accidents were to be charged against the member's ordinary accident account. Whenever the balance of a member's ordinary account was insufficient, and whenever there was a debit balance to such account the directors were to be entitled to call upon the member to make a further contribution, termed a "special call," to the ordinary accident fund of the company. Calls for the extraordinary accident fund and general expenses fund were to be made as nearly as possible pari passu, but that was not to prejudice the right to make a special call in respect of the ordinary accident fund.

On February 26, 1913, a workman (then under age) met with an "ordinary" accident whilst in the employ of the N. M. Colliery Co., Ld., entitling him to be paid compensation under the Workmen's Compensation Act, 1906. At that date the colliery company were members of the indemnity company and were entitled to their remedy over against that company. From March 7, 1921, when he came of age, full compensation, amounting with war additions to 35*s.* per week, was paid to the workman by the indemnity company. In August, 1921, the colliery company fell into arrear with the contributions they were bound to make to the indemnity company, and on September 18, 1921, the latter made their last payment to the workman. After demand made upon them by the indemnity company in August and September, 1921, the colliery company failed to pay to the indemnity company the outstanding calls made upon them, amounting to a substantial sum, with the result that on October 4, 1921, the directors of the indemnity company decided to determine the protection of the colliery company in respect of their mines and works and to cancel the entry of such mines and works from the register of protected mines in accordance with their articles of association, and gave notice of this decision to the colliery company. On October 5, 1921, a receiver was appointed of the

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colliery company on behalf of the debenture holders, and for purposes of the action it was agreed that this date should be treated as the commencement of the liquidation of the colliery company. On March 31, 1924, the workman commenced arbitration proceedings against the indemnity company, claiming against them pursuant to the provisions of s. 5 of the Workmen's Compensation Act, 1906, that they as "insurers" of the colliery company were liable to pay him compensation at the rate of 35*s.* per week as from September 18, 1921, when the last payment was made, in respect of total incapacity. The indemnity company in their answer denied that they were insurers of the colliery company under s. 5 of the Act of 1906 and denied all liability to pay compensation to the workman. The county court judge found that at the commencement of the arbitration proceedings, and for a long period before, no money of the colliery company was available to pay any compensation, but upon the authority of *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (1913) 6 B. W. C. C. 799 he made an award in favour of the workman on the ground that at the commencement of the liquidation of the colliery company there was a right of indemnity vested in them against all payments to be made to the workman in respect of the accident, and that under s. 5, sub-s. 1, of the Act of 1906 that right passed to the workman. On appeal:—

Held, that the effect of the articles of the indemnity company was that whereas the company became insurers as to extraordinary accidents and the cost of proceedings which in their discretion they thought it expedient to take, and which were to be paid for out of the general expenses fund, their liability in the matter of compensation for ordinary accidents was only to pay out such sums as stood to the credit of the member for that purpose, while their right was to require him to replenish his fund when it ran dry; or in other words, such sums as were advanced by the company to the workman or his employers had to be refunded to them by the employers.

Held, therefore, that the contract between the colliery company and the indemnity company was not one of insurance and that s. 5 of the Act of 1906 did not apply in favour of the workman.

Held, further, that if the words "contract with any insurers" in s. 5 were to be read in their widest sense, all the terms of the section must be respected, and that under the proviso the workman could not seek to establish a greater liability against the indemnity company than the latter would have been under to the colliery company.

King v. *Phœnix Assurance Co.* [1910] 2 K. B. 666 followed.

Held, therefore, that the award must be set aside and an award made that the indemnity company were under no liability to the workman.

Daff v. *Midland Colliery Owners' Mutual Indemnity Co.* 6 B. W. C. C. 799 distinguished on the ground that the case there was one of an "extraordinary accident," which was the subject of a true insurance between the insured and insurers, where the insurers had to provide indemnity as under a policy of insurance to make good to the assured the compensation payable by them to the workman.

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APPEAL from an award of the deputy judge of the Ashton-under-Lyne county court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The following statement of facts is taken from the written judgment of the Master of the Rolls :—

"While in the employ of the New Moss Colliery Co., Ld., Harold Pailin (then under age), the applicant in this case, suffered a severe accident on February 26, 1913, entailing the amputation of his left arm and entitling him to be paid compensation under the Workmen's Compensation Act, 1906. The compensation was fixed, and a declaration of liability on the part of his employers to pay it to him was duly made. At that date the New Moss Colliery Co., Ld., were members of the Northern Employers' Mutual Indemnity Co., Ld., and were entitled to their remedy over against this indemnity company. On July 28, 1913, a case of *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (1) was decided by the House of Lords. On March 31, 1914, the necessary resolutions were passed at a meeting of the Northern Employers' Mutual Indemnity Co., Ld. (hereinafter called the appellants), and confirmed on April 22, 1914, to effect alterations in the articles of association of the appellants, deemed requisite in consequence of that decision of the House of Lords. From March 7, 1921, when he had come of age, full compensation, amounting with the war additions to 35*s.* per week, was paid to Pailin by the appellants. In August, 1921, the New Moss Colliery Co., Ld., fell into arrear with the contributions that they were bound to make to the appellants, and on September 18, 1921, the latter made their last payment to Pailin. After demand made upon them by the appellants in August and September, 1921, the New Moss Colliery Co., Ld., failed to pay to the appellants the outstanding calls made upon them amounting to a substantial sum, with the result that at a meeting of the directors of the appellants on October 4, 1921, it was decided, 'to determine the protection of the New Moss Colliery Co., Ld., in respect of their mines and works and to cancel the entry of

(1) 6 B. W. C. C. 799; 82 L. J. (K. B.) 1340.

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such mines and works from the register of protected mines in accordance with the articles of association of the company,' and notice of this decision was at once given by the appellants to the New Moss Colliery Co., Ld., and the appellants ceased to be under any obligation to Pailin's employers.

"On October 5, 1921, a receiver was appointed of the New Moss Colliery Co., Ld., on behalf of the debenture holders.

"On January 1, 1924, the Workmen's Compensation Act, 1923, came into force.

"On March 31, 1924, Pailin made application for arbitration against the appellants, claiming against the appellants pursuant to the provisions of s. 5 of the Workmen's Compensation Act, 1906, that the appellants as 'insurers of the New Moss Colliery Co., Ld.,' were liable to pay to him compensation at the rate of 35*s.* per week as from September 18, 1921, when the last payment was made, in respect of total incapacity.

"The New Moss Colliery Co., Ld., were described in the application as 'in liquidation' and were so treated at the trial, and, it is agreed, are so to be treated before this Court.

"The appellants in their answer denied that they were insurers of the New Moss Colliery Co., Ld., under s. 5 above and denied all liability to pay compensation to Pailin. The county court judge found that at the time of the commencement of these proceedings, and for a long period before, no money belonging to the employer was available to pay any compensation. But upon the authority of *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (1), in the House of Lords, he felt that he was 'bound to find for the applicant,' on the basis 'that at the date of the commencement of the liquidation of the New Moss Colliery Co., Ld., there was a right of indemnity vested in them against all payments to be made to the workman in respect of the accident, and that under s. 5, sub-s. 1, of the Workmen's Compensation Act, 1906, this right passed to the workman.' He therefore made an award for the payment of 273*l.* to the workman in respect of the arrears and ordered the appellants to continue to pay Pailin 35*s.* each week. The appellants thereupon entered this appeal."

(1) 6 B. W. C. C. 799; 82 L. J. (K. B.) 1340.

The appeal was heard on Feb. 5, 6, 9, 1925.

The material articles of association of the appellant company are set out in a note at the end of this report. (1)

Clauson K.C., *Singleton K.C.* and *Sandbach* for the appellants. The questions for determination are: (1.) what according to the true construction of the articles of associatiom of the appellants, who are a mutual insurance company, is the liability, if any, to the workman, the respondent to this appeal? and (2.) at what date the rights of the workman became crystallized against the appellants?

It is submitted that after notice was given to the colliery company terminating the protection of that company, thenceforward the appellants ceased to be under any obligation to the company. Under the articles the colliery company supplied the money for all payments made by the appellants in respect of "ordinary accidents" which happened to their workmen, but in the case of "extraordinary accidents" involving the death of the workmen, every member of the appellant company contributed towards the sums payable, so that in the case of "ordinary accidents" there was protection, but not any insurance at all.

A workman cannot under s. 5 of the Workmen's Compensation Act, 1906, have higher rights against an insurance company than his employer has: *King* v. *Phœnix Assurance Co.* (2) In gremio of the contract in this case between the appellants and the colliery company was the power to modify under art. 114. (3) When this accident took place on February 26, 1913, the contract was that contained in art. 12 in its old form (3), but in 1914, in consequence of the decision of the House of Lords in *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (4) the article was altered, and the contract was altered accordingly, so as to provide for the determination of protection in respect of past as well as future accidents. It is submitted therefore that on October 4, 1921, when the notice of determination was given by the

(1) See note post, pp. 96 et seq.
(2) [1910] 2 K. B. 666.
(3) See note post, p. 99.
(4) 6 B. W. C. C. 799; 82 L. J. (K. B.) 1340;

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appellants to the colliery company, the colliery company forfeited and ceased to have any rights against or to be entitled to any indemnity from the appellants and consequently that no rights were transferred to or became vested in the workman under s. 5 of the Act of 1906.

[SCRUTTON L.J. referred to *West of England Fire Insurance Co.* v. *Isaacs.* (1)]

Under the articles the appellants were at the most limited insurers only of the colliery company, their liability being limited to the amount of the payments received by them from the colliery company, and these at the date of the notice determining the protection were largely in arrear. There was therefore no fund out of which the colliery company or the respondent was entitled to receive any payment.

The appellants' articles were considered in *Northern Employers' Mutual Indemnity Co.* v. *Kniveton* (2) and *Morris* v. *Northern Employers' Mutual Indemnity Co.* (3) In the reports of the same cases in the Law Reports (4) the point on the articles is not dealt with.

Cyril Atkinson K.C. and *P. Redmond Barry* for the respondent. The contract between the appellants and the colliery company which was in existence at the date when the claim arose gave the colliery company complete indemnity against accidents which arose within the protected period and was not limited to the payments which became payable within that period: *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (5) If then the colliery company were protected at the time the accident happened they were entitled to indemnity, even although they did not make any subsequent payments. The right of indemnity which existed when the amended articles came into force was not affected by the alterations in the articles. The words of the amendments are not apt to cover existing claims.

Assuming, however, that an employer might give up or modify an existing right, art. 17 (*a*) (6) gives him a complete

(1) [1897] 1 K. B. 226.
(2) (1902) 18 Times L. R. 504.
(3) (1902) 18 Times L. R. 635.
(4) See [1902] 1 K. B. 880 and [1902] 2 K. B. 165.
(5) 6 B. W. C. C. 799; 82 L. J. (K. B.) 1340.
(6) See note post, p. 97.

indemnity against claims in respect of accidents not resulting in death. Art. 20 (1) makes the ordinary accident fund primarily liable for those claims. The liability of the appellants to indemnify a member is not limited by art. 22 (2) to the amount standing to the credit of the member's private account. Art. 19 (3), which gives the member a right to compromise a claim, contemplates that the mutual liability will continue after he has ceased to be a member. The rights of members can only be terminated in accordance with the articles. Art. 9 (2.) (4) has a direct reference to the terms on which membership may be terminated. There is nothing in that article as to putting an end to an indemnity in respect of an accident which has happened. Art. 12 (5) is the article relied on by the appellants as putting an end to the liability in respect of an accident which has happened, but it is submitted that the present case is covered by *Daff's* case (6), where it was held that an article similar in terms to art. 12 (5) before it was amended did not operate to put an end to a liability in respect of an accident which had already happened. Every word of the judgments of Lord Dunedin and Lord Moulton in that case is applicable to art. 12 (5) in this case. There was therefore a right of indemnity vested in the colliery company notwithstanding their failure to make subsequent payments, which was not put an end to by the articles.

There are three classes of accidents which may possibly have been intended to be provided for by art. 12 in its amended form (5) : (1.) accidents occurring after the alteration and after determination of protection, (2.) accidents occurring after the alteration, but before the determination of protection, and (3.) accidents which had already occurred before the alteration. It is submitted that the amended article was not intended to affect vested rights and that every word of it can be given effect to without affecting those rights. The article in its amended form was intended to deal with accidents which

(1) See note post, p. 97.
(2) See note post, p. 98.
(3) See note post, p. 97.
(4) See note post, p. 96.
(5) See note post, p. 96.
(6) 6 B. W. C. C. 799; 82 L. J. (K. B.) 1340.

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were going to happen in the future and not with accidents which had already happened. It constituted a new scheme of insurance and therefore prima facie was only applicable to future events. It is submitted, therefore, that under *Daff's* case (1) the colliery company acquired a vested right, which was not affected by the amended articles, and that that right was transferred to the respondent by s. 5 of the Act of 1906.

Clauson K.C. in reply. Mutual insurance differs from ordinary insurance in that in the case of the former the contributions must be kept up after the risk has happened. Here the colliery company were in arrear with their payments to the respondent, and there is no doubt that the appellants had been making payments in respect of the accident to the respondent, which the colliery company had not reimbursed them. They were therefore under no further liability to continue these payments. A workman acquires no rights under s. 5 of the Act of 1906 until the date of the assignment.

On no possible construction of the articles, it is submitted, can the award of the county court judge against the appellants be supported.

Cur. adv. vult.

Feb. 19. The following written judgments were delivered :—

POLLOCK M.R. [after stating the facts as above set out]. The portions of s. 5 of the Act of 1906 relevant to this case are as follows : Sub-s. 1, " Where any employer has entered into a contract with any insurers in respect of any liability under this Act to any workman, then . . . . if the employer is a company in the event of the company having commenced to be wound up, the rights of the employer against the insurers as respects that liability shall, notwithstanding anything in the enactments relating to bankruptcy and the winding up of companies, be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would

(1) 6 B. W. C. C. 799; 82 L. J. (K. B.) 1340.

have been under to the employer." Inasmuch as this case falls to be dealt with as if the New Moss Colliery Co., Ld., were in liquidation, it does not appear necessary to consider the terms of s. 19 of the Act of 1923. The effect of s. 5, sub-s. 1, of the Act of 1906 may be stated as giving the workman, by subrogation, the rights against the insurers that his employers had at the time when his employers, being a company, commenced to be wound up, so however that the insurers' liability to the workman is not greater than that under which they were to his employers.

What was the liability of the insurers, the appellants, on October 5, 1921, the date when the liquidation commenced, to the New Moss Colliery Co., Ld.? At that date the protection of the colliery company had been determined, and the entry of their name upon the register of protected mines had been cancelled.

The right of the appellants to take these steps had accrued under the terms of art. 9 (2.) read as it stood before any amendment was made to it, as stated in 1914, for the New Moss Colliery Co., Ld., had failed to observe regulations binding upon them in the matter of the payment of calls made upon them, with the consequence set out in article 12 (before amendment) that they were not entitled to any indemnity in respect of any accident unless certain steps were taken and results followed which were not taken and did not follow in the present case. It is argued that the effect of these articles is uncertain, at any rate before the amendments made in 1914, and that those amendments cannot affect the relation of the insured and insurers in respect of an accident which happened before they were made, even though by art. 114 power was taken to alter the regulations for the time being of the company extending "to any and every alteration that may seem expedient, and it is to be no objection to any such alteration that it affects, or may affect the rights from time to time acquired hereunder, whether retrospectively or prospectively." It is however in my judgment unnecessary to determine this point, for I have come to the conclusion that the appellants were not insurers of the New

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Moss Colliery Co., Ld., against the liability which it is now sought to enforce against them.

The accident which happened to Pailin was an "ordinary accident" within the articles of association of the appellants. By art. 17–19 "ordinary accidents" are dealt with.

By arts. 20–23 an "Ordinary Accident Fund" is established, and "an ordinary accident account as to each member" is to be kept.

By art. 19 all sums paid by the company for compensation or indemnity in respect of ordinary accidents are to be charged against "the member's ordinary accident account."

Finally by art. 23 whenever the balance of a member's "ordinary accident account" is insufficient, and whenever there is a debit balance to such account the directors may call upon the member to make a further contribution, termed "a special call," to the Ordinary Accident Fund of the company. By art. 30 calls for the Extraordinary Accident Fund and General Expenses Fund are to be made as nearly as possible pari passu, but that is not to prejudice the right to make a special call under art. 23.

The effect of these articles, in my judgment, is that whereas the appellants become insurers as to extraordinary accidents and the cost of proceedings which in their discretion they thought it expedient to take, and which are to be paid for out of the General Expenses Fund under art. 29, their liability in the matter of compensation for ordinary accidents was only to pay out such sums as stood to the credit of the member for that purpose, while their right was to require him to replenish his fund when it ran dry. Putting it in another way, such sums as were advanced by the appellants to the workman or his employers had to be refunded to them by the employers. Pailin, if he received any sums from them, would under the latter words of s. 5, sub-s. 1, be subject to recourse by them to require the payments made by them to be reimbursed to them by him: and see *Midland Insurance Co.* v. *Smith.* (1).

Daff v. *Midland Colliery Owners' Mutual Indemnity Co.* (2),

(1) (1881) 6 Q. B. D. 561. (2) 6 B. W. C. C. 799.

which the county court judge felt compelled to apply and follow, does not in my opinion apply to the present case. It was a case of an "extraordinary accident" which was the subject of a true insurance between the insured and insurers, where the insurers had to provide indemnity as under a policy of insurance, to make good to the insured any compensation payable by them to the workman. Upon the event happening which was the subject matter of the policy, their liability arose, and no subsequent determination could alter the liability of the insurers in respect of a risk which had matured and was transferred to the insured by s. 5.

Lord Dunedin (1) refers to the proviso to s. 5: "But the proviso secures that as is generally the case assignatus utitur jure auctoris, and the workman can recover no more from the insurer than the insured person or company could have recovered. I agree . . . . that if the contract with the insurer contain a clause resolutive of the contract in certain events that clause will be effectual against the workman as it would have been effectual against his employer." As I have said, for the reasons stated, the contract between the New Moss Colliery Co., Ld., and the appellants was not one of insurance, and s. 5 does not apply in favour of the workman. But if "contract with any insurers" in the section is to be read in its widest sense, all the terms of it must be respected, and under the proviso, the workman cannot seek to establish a greater liability against the appellants than the latter would have been under to his employers. "The workman cannot be in any better or different position than the employer." This was the view of s. 5 expressed by Cozens-Hardy M.R. in *King* v. *Phœnix Assurance Co.* (2) with which Lord Dunedin expressed his concurrence in *Daff's* case. (3)

We have been supplied with a copy of the full judgment of Channell J. in *Northern Employers' Mutual Indemnity Co.* v. *Kniveton.* (4) The section under which the claim was made in that case was s. 5 of the Workmen's Compensation

(1) 6 B. W. C. C. 812. [1910] 2 K. B. 666, 670.
(2) (1910) 3 B. W. C. C. 442, 446; (3) 6 B. W. C. C. 799, 812.
(4) 18 Times L. R. 504.

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Act, 1897, different in terms, though not in purpose, from s. 5 of the Act of 1906. Channell J. held that the section was a statutory subrogation of the workman to the rights of the employer against the appellants; but he held upon these same articles of association that the right of the employer to be indemnified, in substance, was conditional on his providing the money, and consequently that there could be no charge in favour of the workman except subject to that condition. He held that there was nothing in the words of the section to extend the liability of the insurance company. Speaking of ordinary accidents he held that the effect of the articles was that so far as regards the money which ultimately has to be paid by way of compensation to the workman, the employer pays that himself. I agree with this view. *Daff's* case (1) depends upon different facts, and was decided in respect of a liability of the insurers, very different from that in the present case, and is not an authority which must be followed to determine our decision.

For these reasons I am of opinion that the appeal must be allowed with costs here and below, the award in favour of the workman must be set aside and an award made that the appellants are under no liability to the workman.

SCRUTTON L.J. This appeal raises some difficult and important questions on the working out of s. 5 of the Workmen's Compensation Act, 1906, relating to the rights and liabilities of an injured workman towards the insurers of his bankrupt employers.

Pailin, the workman in question, met with an accident on February 26, 1913, entitling him to compensation from his employers, the New Moss Colliery Co., Ld. The employers were members of a mutual indemnity and protection association, the Northern Employers' Mutual Indemnity Company, Ld. No question arises as to compensation between February 25, 1913, and September 24, 1921, but on October 5, 1921, the New Moss Colliery Co., Ld., went into the hands of a receiver for the debenture holders. No compensation was paid after

(1) 6 B. W. C. C. 799.

that date, but as no winding-up proceedings were commenced s. 5 of the Act of 1906 did not help the workman. On January 1, 1924, the Workmen's Compensation Act, 1923, came into force, and s. 19 of that Act made s. 5 of the Act of 1906 apply in favour of the workman when either a receiver is appointed on behalf of debenture holders or debenture holders take possession. Thereupon, on March 31, 1924, Pailin demanded arbitration against the insurance company, asking for the payment of 35*s.* a week from September 18, 1921. The county court judge has awarded him 273*l.* for compensation from September 24, 1921, to September 13, 1924, and a further payment of 35*s.* a week. The insurance company appeals.

Sect. 5 of the Act of 1906 is, in effect, a statutory subrogation of the injured workman to the rights of the employers against the insurance company, taking effect on the employers' bankruptcy. The workman gets the rights of the employers against the insurers, and the insurers are not to be under any greater liability to the workman than they would have been under to the employers. If in consequence the workman gets less from the insurers than he would from the employers, he is to prove for the balance in the liquidation. I refer to the statement of the position in the first paragraph of Lord Dunedin's judgment in *Daff's* case (1), and to the judgments of this Court in *King* v. *Phœnix Assurance Co.* (2)

The doctrine of subrogation and its effects are well known to the Courts, though usually the question arises where an insurer who has paid a loss is subrogated to the rights of the assured against a third party who caused the loss. The insurer only enforces the rights of the assured subject to all difficulties which would affect a claim by the assured. Thus, in *Midland Insurance Co.* v. *Smith* (3), where an insurer had insured against fire the property of a husband, and the property was burnt by the felonious act of the wife of the assured, it was held that by no subrogation could the insurer get relief, for he could not be subrogated to any right against

(1) 6 B. W. C. C. 799, 812.
(2) 3 B. W. C. C. 442, 446; [1910] 2 K. B. 666.
(3) 6 Q. B. D. 561.

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the husband as responsible for the torts of his wife, for the husband could not sue himself, nor could he be subrogated to any rights against the wife, for the husband could not sue his wife. So also if the insurer, on being subrogated to the rights of the assured against a third party, found that the assured had destroyed them by compromise or release, the insurer was bound by the acts of the assured against the third party; his remedy, if any, was against the assured for injuring the insurer's rights and remedies: *West of England Fire Insurance Co.* v. *Isaacs.* (1) The question in the present case, therefore, is: Could the employers have maintained this action against the insurance company on any, and what, terms?

Now the relation of the employer and the insurance company here is somewhat complex. The losses which might fall on the employers were divided into three classes: (1.) Accidents at his mine which resulted in the death of any person, which, so far as they resulted in the death, were called "extraordinary accidents." These were borne by an Extraordinary Accident Fund, formed by calls on all the members of that class,—i.e., those insured against extraordinary accidents. This was insurance proper, where each assured pays a premium to be relieved of a greater liability, and may in fact suffer no loss but the payment of his premium, or may be relieved of a greater loss than his premium out of the premiums of others. *Daff's* case (2) related only to an extraordinary loss of this kind.

(2.) Accidents at the mine which do not result in death, called "ordinary accidents." These, as far as compensation to the workman was concerned, were paid out of an Ordinary Accident Fund, composed in the first instance of calls from each member, but as to which each member was obliged, if required, to pay up to the fund the sums which the fund had paid on his account. An account was kept for each member, credited with his calls, debited with sums paid in respect of his accidents, and if it became in debit a special call was made on him to make up the deficiency. This does not seem to

(1) [1897] 1 Q. B. 226.

(2) 6 B. W. C. C. 799.

me to be insurance at all. The insurer is not indemnifying against loss, but paying on behalf of the employer a sum for which he is entitled to be indemnified by the employer. The insurer is an indemnified agent, not an indemnifying principal. The effect of such a transaction was not in issue in *Daff's* case (1), which was that of extraordinary accident and real insurance.

But, (3.), there is a class of loss and benefit which may be described as "protection," the expenses and charges of which were defrayed out of the General Expenses Fund. The insurance company acted as an experienced agent for defending and settling claims on its members, and its management expenses, the costs of defence and the costs paid the successful plaintiff came out of a fund provided by calls on all members, and not contributed by each member for his own accident. This is genuine protection, and is not a question in this case. which does not relate to any question of costs.

Now the accident in this case is an "ordinary accident," and if the employers said: "Pay us 35*s.* a week, which we have to pay to Pailin," the insurance company would have a right to say: "Certainly, but we make a call on you to provide us with that 35*s.*, or to repay us that 35*s.* we have paid." If the workman gets the 35*s.* without repaying it, the insurers are under a greater liability to him than they would be to the employer. In my view, s. 5 was never meant to apply to this class of case at all, for the transaction is not insurance, but protection machinery with an indemnity from the employer to the agent for sums paid on the employer's behalf. This is the view taken of the transaction by Channell J. in his judgment in *Kniveton's* case (2), of which we were furnished with a transcript. I am not bound by *Daff's* case (1) to hold that it is insurance, for the accident in *Daff's* case (1) was the subject of a real insurance of "extraordinary accidents," not, like this, an "ordinary accident" with its consequences.

The matter does not end here. Assume that this transaction is insurance, the workman is exposed to all the defences

(1) 6 B. W. C. C. 799. (2) 18 Times L. R. 504.

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that might be raised against the employers; and in the present case, against the employers, the insurance company says two things: (1.) "Our regulations, by which you are bound, relieve us, in the events that have happened, against liability to repay you this compensation if you had paid it yourself." (2.) "If we are liable to you, you owe us a sum of at least 500*l.*, which we can set-off. On either ground you are not entitled to the order the county court judge has made."

First, as to the effect of the regulations. The facts here are that on August 6, 1921, the employers were owing the insurance company 517*l.* 3*s.* 2*d.* for calls, 500*l.* of this being on the Ordinary Accident Fund, and the employers' Ordinary Accident Account was actually in debit 285*l.* 4*s.* 11*d.*, a portion of which must have been payments in the present case. The employers were warned of this on August 17, August 26, and September 27, and as they did not pay, the directors of the insurance company on October 4 determined their protection. At that time no right of subrogation had accrued to the workman. The directors were entitled to do this under their arts. 9 (2.) and 12, the latter of which articles had been amended in 1914, after the decision of the House of Lords in *Daff's* case (1), and presumably to meet the effect of that decision. It was not seriously argued that employers and insurance company might not by agreement alter their relations after an accident had happened, or that the company might not without the assent of the employers alter their articles in the prescribed manner. Art. 114 expressly deals with this question.

The employers being in default, and their protection terminated under art. 9 (2.), art. 12 provides, that a member when in default as regards the payment of money shall not be entitled to any indemnity in respect of any accident as to which such payment became due. The payment here due was under a call in respect of ordinary accidents, including this case, as to which 500*l.* was called, and on August 17 285*l.* 4*s.* 11*d.* had actually been paid by the

(1) 6 B. W. C. C. 799.

company, which they were entitled to recover from the employers, while between August 17 and September 24 they must have paid a further 8*l.* 15*s.* in respect of this accident, which they were entitled to recover from the employers. Further, a failure to pay money due for calls is a breach of art. 31, justifying termination of protection under art. 9 (2.), and in that case art. 12 provides that the member shall absolutely forfeit, and ceases thenceforward to be entitled to any indemnity, whether in respect of (1.) accidents which occurred prior to such determination, or (2.) which may occur subsequently thereto, or (3.) which may occur "otherwise howsoever." These words seem to me clearly to cover the accident in this case, and to relieve the insurance company from any liability to indemnify after the determination in respect of the accident which had happened before the determination. It is argued, as I understand, that before the new art. 12 is applied to accidents which happened before it assumed its new form, clear words are necessary, and that the words used can be satisfied by limiting them to accidents occurring after the alteration, though before the default. But the words "otherwise howsoever" show that it was intended to cover every accident: see *Larsen* v. *Sylvester & Co.* (1); and I do not see any grounds for limiting words, which in themselves are wide enough to cover this accident, especially in a case where art. 114 has given warning that articles may be altered with retrospective effect.

The county court judge held himself bound to make the order he did, evidently contrary to his own opinion, by the decision of the House of Lords in *Daff's* case. (2) This, as I have said, was the case of an extraordinary accident of which the company were real insurers. The insurance company had made a call on the employer on May 26, due July 24. On July 24, before the time for payment had expired, the member company went into liquidation. On August 2 the liquidator sent a cheque, which the company received on August 3, and on August 4 passed a resolution terminating protection, as the company was in default. The

(1) [1908] A. C. 295. (2) 6 B. W. C. C. 799.

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House of Lords held that the company were not on August 4 in default, and if so, of course, they had not forfeited indemnity. They went on rather unnecessarily to consider what would have been the position if they had been in default. Art. 11 of that insurance company's rules provided (1.) that a member in default should not be entitled to indemnity in respect of an accident occurring during the default, which was not the case before the House, and (2.) that if protection has been determined he "shall not be entitled to any indemnity in respect of any accident," which the House of Lords thought did not clearly apply to past accidents, but might only apply to future accidents. It was to meet this decision that the present insurance company altered, in 1914, their art. 12, and in my view have clearly made it apply to all past accidents.

I think the county court judge erred: (1.) In thinking that the articles to be considered were the rules at the time of the accident and not the amended rules. If the employers were bound by the amendments, as they clearly were, the workman had only the employers' rights. (2.) In not applying the new art. 12 to the case, which in my view clearly excludes the company's liability in the events which have happened. If there were any liability, the insurance company would clearly be entitled to set-off against the employers, and therefore against the workman, their claim for calls. This point had been expressly reserved in *Daff's* case (1) by the House of Lords. I agree with Channell J.'s views on this point.

For the reasons: (1.) that as regards compensation for ordinary accidents there is here no insurance, but only payment by the company as agent for employers who must indemnify them; (2.) that if there is insurance, the liability of the company to the employers has been effectively terminated, and therefore the workman can recover nothing; (3.) that anyhow the insurance company would be protected by set-off—in my opinion the appeal succeeds and judgment must be entered for the insurance company with costs here and below.

I desire to add that the question whether s. 19 of the Act

(1) 6 B. W. C. C. 799.

of 1923 was retrospective—i.e., whether it applied to cases where the accident happened and the receiver was appointed before the Act came into force—was not argued before the county court judge or before us. As the protection determined before the receiver was appointed, it probably was not necessary to argue the question of the retrospective operation of this section, but I mention it to show that the question is open on any future occasion.

SARGANT L.J. In this case the questions between the parties were argued on the footing that New Moss Colliery Co., Ld. (hereinafter called "the New Moss Company"), were in liquidation, and accordingly s. 5 of the Workmen's Compensation Act, 1906, applied. In fact the New Moss Company are not in liquidation, but have merely had a receiver appointed, on behalf of holders of debentures secured by a floating charge; and this appointment was made on October 5, 1921, that is more than two years prior to the operation of the alteration effected by s. 19 of the Workmen's Compensation Act, 1923. But, inasmuch as the New Moss Company might at any moment be put into liquidation, whereupon s. 5 of the Act of 1906 would immediately come into force, the appellants here, the Northern Employers' Mutual Indemnity Company, Ld. (hereinafter called "the Northern Company"), are prepared to accept responsibility as on the footing of the New Moss Company having actually been in liquidation, as was assumed to be the case when the matter was before the county court.

The learned county court judge has held that he was bound by the reasoning of the House of Lords in *Daff* v. *Midland Colliery Owners' Mutual Indemnity Co.* (1), and accordingly that the workman is entitled to succeed against the Northern Company. The appeal is based upon the assertion that there are two main differences between the facts in that case and those in the present case. In the first place it is said that, although at the date of the accident and till shortly after the decision in *Daff's* case (1), art. 12 of the Northern Company

(1) 6 B. W. C. C. 799.

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and certain incidental articles were to the same effect as the corresponding articles of the Midland Company in *Daff's* case (1), there had, after the decision in *Daff*'s case (1), been an alteration in art. 12 and any incidental articles of the Northern Company's regulations under which prior to the liquidation of the New Moss Company the Northern Company had succeeded in terminating the right of the New Moss Company to indemnity or insurance even as regards liability for accidents which had happened prior to the alteration in question. In the second place it is said that the decision in *Daff's* case (1) was with regard to compensation equivalent to that payable on an "extraordinary" accident, as to which a real insurance, though of a mutual character, was provided for by the articles of the Midland Company, and is also provided for by those of the Northern Company; but that here the case is one of an "ordinary" accident and that as to such accidents, or rather any weekly sums, payable as compensation therefor, no insurance in any real or effective sense is provided for by the articles of the Northern Company.

About the first of these two differences I need say little having regard to the conclusion I have arrived at as to the second difference. But in view of the very able and thorough way in which this question was argued both by Mr. Clauson for the appellant company and by Mr. Cyril Atkinson for the respondent workman I feel bound to express an opinion in favour of Mr. Atkinson's construction. Taking it, as both counsel did, that the alteration was made for the purpose of escaping the views expressed in *Daff's* case (1), what was the extent of the escape aimed at? Was it an alteration of a code of liability which merely lessened such liability in the future? Or did it go further and lessen liability even in the case of risks that had already matured and were represented by accrued vested rights to indemnity? For the purpose of answering this question Mr. Atkinson divided the accidents with which the altered article might deal into three classes—namely: (1.) Accidents occurring after

(1) 6 B. W. C. C. 799.

the alteration and after a determination of protection. (2.) Accidents occurring after the alteration but before a determination of protection, and (3.) Accidents which had already occurred before the alteration; and he argued that the words of art. 12 as altered, and of any incidental article, were fully satisfied by a construction limiting them to the first two classes of accident, and that there was therefore no need to hold that they applied to accidents which had already happened and in respect of which an existing liability had already accrued. This argument is to my mind sound and may be summed up in this—namely, that while the alterations in Art. 12 resulted in the creation of a new code of liability, this code was intended to apply to insurance in the future only, as would naturally be expected, and contained nothing sufficient to make it serve the much more unlikely purpose of affecting rights already accrued under risks that had matured under the previous code, and for which payments in the nature of premiums had already been made.

But the second of the two differences between *Daff's* case (1) and the present case is, in my judgment, crucial and sufficient to entitle the Northern Company to succeed on this appeal. It is true that in *Daff's* case (1), as here, the liability involved was in respect of a weekly payment to an injured workman. But in that case the articles which formed the contract with the employers provided (art. 1) that though an "ordinary" accident meant prima facie one which resulted in injury but not in the death of any person, while an "extraordinary" accident meant one resulting in the death of a person, yet that when the compensation payable in respect of total or partial incapacity should extend over more than twenty-six weeks all payments in respect thereof after such twenty-six weeks were thereinafter called "extra compensation in respect of ordinary accidents." And by subsequent articles, particularly art. 27, both compensation in respect of extraordinary accidents and extra compensation in respect of ordinary accidents were placed on the same footing, and were

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provided for out of the Extraordinary Accident Fund, which was contributed to by all the members of the Midland Company. On the other hand under the articles of association of the Northern Company there is not and never was any such provision as to a change in the incidence of compensation for ordinary accidents, however long such compensation may be payable. And this being so *Daff's* case (1), in which the question was one as to extra compensation in respect of an ordinary accident, would only be a precedent in the present case, which is one of an ordinary accident under the Northern Company's regulations, if the incidence of the compensation for ordinary accidents were the same as that for extraordinary accidents.

But when the regulations of the Northern Company come to be examined it is at once apparent that compensation for ordinary accidents is dealt with on a completely different basis from that for extraordinary accidents. In the case of ordinary accidents all sums paid by the Northern Company for compensation or indemnity in respect of any ordinary accident are charged under art. 19 against the particular member's ordinary accident account, and are ultimately payable under art. 22 by means of contributions levied either previously or subsequently on the particular member alone, so that in the result each member provides for and pays the cost of the compensation in respect of any ordinary accident occurring to any one of his workmen. But in the case of extraordinary accidents the Northern Company under art. 24 has to indemnify each member against all proceedings, costs, damages, claims and demands in respect of any extraordinary accident to the member's workmen, and the cost thereof is under art. 26 thrown on an Extraordinary Accident Fund, which is provided and replenished by calls made on all the members irrespective of whether the accident was to one of their workmen or not.

Accordingly it is clear that under these articles there is no insurance at all, in any ordinary sense of the word, of any

(1) 6 B. W. C. C. 799.

member against any compensation in respect of ordinary accidents to his workmen. No indemnity is provided by the members generally against any such compensation; but on the contrary this compensation has to be provided exclusively by the member whose workman has suffered the accident. It may no doubt be the case that if the member's ordinary accident account is insufficient or overdrawn some temporary payment may have to be provided by the Northern Company out of their funds, but any such payment is at once debited against the particular member, and per contra the company need not allow any such overdrawing to occur, since they are entitled to make calls on the particular member by anticipation to an amount sufficient to meet his prospective liability. In my judgment this prevents the arrangement between the company and each particular member amounting to an insurance at all as regards liability for compensation for ordinary accidents such as the present, and renders the reasoning in *Daff's* case (1) quite inapplicable here.

But, even if the Northern Company were to be regarded here as insurers of the employers against the compensation payable to the applicant, it is nevertheless clear in my judgment that the applicant has no enforceable pecuniary claim against the Northern Company. For the concluding words of s. 5, sub-s. 1, of the Act of 1906, expressly provide that the insurers shall not be under any greater pecuniary liability to the workman than they would have been to the employer. Now the liability of the Northern Company to the New Moss Company as regards compensation to the applicant was only to pay such compensation to the extent to which they were from time to time put in funds by the New Moss Company for the purpose, or in other words there was no net liability in existence at all. But under the order appealed from the Northern Company are charged with a large and continuing liability to the workman entirely irrespective of any provision by him to meet that liability. Such a result is in direct contradiction of the concluding

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words of s. 5, sub-s. 1, as well as being incompatible with any reasonable application of the general doctrine of subrogation.

Appeal allowed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Peace & Ellis, Wigan.*

Solicitors for respondent: *Barlow, Lyde & Yates, for James Chapman & Co., Manchester.*

NOTE.

The material articles of association of the Northern Employers' Mutual Indemnity Company, Ld., were the following:—

Art. 9 (2.). "The directors may at any time, upon breach of or failure to observe any of the regulations for the time being of the company, by notice in writing to any member, determine, as from the date of such notice, his protection in respect of any mine or works of such member, and shall thereupon cancel the entry of such mine or works in the Register of protected mines and works, and such determination shall be without prejudice to the member's liability to perform all his obligations existing at the date of such determination in respect of any accident occurring before such determination, and the directors shall be at liberty to annul such cancellation and restore such entry on such terms and conditions as they may think fit."

By a resolution of the company dated April 22, 1914, this article was altered by adding the words "as from the date of such notice" after the words "by notice in writing to any member, determine"; and by adding the words "existing at the date of such determination" after the words "without prejudice to the member's liability to perform all his obligations."

Art. 12. "Whenever a member or past member is in default as regards the payment of any money due to the company, he shall not be entitled to any indemnity in respect of any accident occurring whilst such default continues, or in respect of which such payment became due. And whenever a member's protection has determined under clause 9 (2.) or clause 35 hereof, he shall thereupon absolutely forfeit and cease thenceforward to be entitled to any indemnity whether in respect of accidents which occurred prior to such determination or which may occur subsequently thereto or otherwise howsoever, unless he shall, within three days after notice of such determination, give to the company notice in writing of his desire to appeal to a general meeting against such determination, and a general meeting, held within one month thereafter, shall nullify such determination. And when any such notice of appeal is given, the directors shall, without prejudice to their determination, until the meeting is held continue to treat the protection as subsisting and shall act accordingly; and the directors shall forthwith convene a general meeting to consider and determine the appeal, and if in the result the determination of the directors

shall not be reversed, the member whose protection was determined thereby shall forthwith make good to the company all outgoings and expenses incurred by the company in the meantime under the foregoing provisions of this clause, and a certificate under the common seal of the company as to the amount thereof shall be conclusive."

By a resolution of the company dated April 22, 1914, this article was altered by adding the words "or past member" in line 1, after the words "Whenever a member," and by adding the words "or in respect of which such payment became due" after the words "occurring whilst such default continues," and by striking out the words "he shall not be entitled to any indemnity in respect of any accident," and substituting therefor "he shall thereupon absolutely forfeit and cease thenceforward to be entitled to any indemnity, whether in respect of accidents which occurred prior to such determination or which may occur subsequently thereto or otherwise howsoever."

Art. 17. "Whilst and whenever any mine or works is entered in the Register of protected mines and works, the company is, in respect of every ordinary accident, or alleged ordinary accident, to be under the obligations following towards the member protected, in respect of such mine or works, that is to say:—

(*a*) Subject to the provisions of clause 12 hereof, the company is to indemnify such member against all proceedings, costs, damages, claims, and demands, in respect of such accident or alleged accident, so far as regards personal injury, not resulting in the death of the person injured.

(*b*) The company is, whenever any such accident or alleged accident is notified to it, to take all such steps as may be expedient with a view to the medical examination of the person injured, and with a view to the inspection of the mine or works at which such accident occurred, or is alleged to have occurred, and with a view to ascertaining the circumstances of the accident, and to obtaining and recording evidence and information in respect thereof, and to supervising the case prior to the final settlement thereof.

(*c*) The company, if it thinks expedient, is to resist and oppose any claim, and to take and defend all such legal proceedings, and give all such notices on behalf of the members as shall, in its opinion, be expedient, with a view to such resistance and opposition."

Art. 18. "Whenever an ordinary accident occurs to any workman of any member protected by the company, such member is forthwith to give notice thereof to the company, and is to furnish the company with all such information and assistance in regard thereto as the company may require."

Art. 19. "Whenever any claim is made against a member in respect of any ordinary accident or alleged ordinary accident, such member may at any time before the final settlement of such claim, notify in writing to the company his desire that such claim shall be resisted, or shall be conceded, or shall be compromised, or otherwise dealt with in any specified manner, and the company shall, if in the judgment of the directors, it shall be desirable so to do, but not otherwise, deal with the same accordingly, and all sums paid by the company for compensation or indemnity in respect thereof shall be charged against such member's ordinary accident account hereinafter mentioned."

Art. 20. "A fund is to be established by the company, and is to be

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called 'The Ordinary Accident Fund,' and such fund is to be composed of the contributions of the members thereto, and with a view to obtaining such contributions the directors may from time to time make calls on the members (other than non-contributing members), to be called 'General Calls,' in such proportions as the directors in their absolute discretion may in the circumstances think fit and proper, and any such call may be made payable in a lump sum or by instalments, and at such time or times and place or places as the directors may determine, and every member liable to pay any such call shall pay the same accordingly. Such fund shall (subject as hereinafter provided) be applied to the payment of all sums payable to the company for compensation in respect of ordinary accidents."

Art. 21. "The Ordinary Accident Fund shall be kept separate from the other assets of the company, and the whole or any part thereof may from time to time be paid to the credit of the company with the company's bankers, or may be invested in such stocks, funds, or securities authorised by law for the investment of trust funds, as the directors may think expedient, and the directors may at any time vary any such investments and realize or dispose of the same as they think expedient. The interest from time to time resulting from any investment of such fund shall be credited, half-yearly or otherwise, as the directors determine, to the separate accounts—hereinafter referred to—of the members in respect of ordinary accidents in proportion to the amount, for the time being, standing to the credit of the members respectively, in such separate accounts, as aforesaid."

Art. 22. "A separate account to be called 'The Ordinary Accident Account' shall (as regards each member) be kept in the books of the company, and such account shall from time to time be credited with all sums contributed to the ordinary accident fund by such member and his share in accordance with clause 21 of any interest from time to time resulting from any investment under that clause, and shall be debited with all sums from time to time paid by the company for compensation in respect of ordinary accidents, in respect of which such member is protected."

Art. 23. "Whenever the balance to the credit of any member's ordinary accident account is in the opinion of the directors insufficient, and whenever there is a debit balance to such account the directors may call on the member to make a further contribution to the ordinary accident fund of the company. Any call so made shall be termed a 'Special Call.'"

Art. 29. "A fund to be called 'The General Expenses Fund' shall be established, and such fund shall be applicable to the payment of all the expenses of and incident to the formation, promotion, and registration of the company, and to the management of the company's business including all payments other than payments for compensation in respect of ordinary and extraordinary accidents, and in respect of re-insurance or counter-indemnity, as in clause 26 hereof mentioned, and the directors may from time to time make calls on the members (other than non-contributing members) to contribute to the General Expenses Fund in proportion to the number of persons employed by such member at the mine or works, or the mine and works, in respect of which such member shall for the time being be protected at such rates per person as the directors may in the circumstances in their absolute discretion think fit and proper, subject nevertheless to clause 30 hereof."

Art. 30. "Subject to the provisions of clause 29 hereof, the directors may from time to time determine the rates or proportions in which the members shall be bound to contribute to the funds of the company, and in particular whether in proportion to the number of workmen employed, or to the number of tons raised, or quantity produced, or to the weekly, or monthly, or daily wages of the men employed, and they may in the case of one member or class of members, or class of workmen, adopt one basis of contribution, and in the case of another member or class of members or class of workmen may adopt some other basis of contribution as to them shall seem just, and may assess the same member on a different basis in respect of contribution to one fund to that on which he is assessed in respect of contribution to another fund, and calls shall be made accordingly, nevertheless calls for contribution to the Extraordinary Accident Fund and General Expenses Fund, shall be made as nearly as may be pari passu on members protected in respect of the same class of mines or works, but the provisions of this clause are to be without prejudice to any special call to be made under clause 23 hereof."

Art. 31. "Whenever the directors make a call on any member or members such call is to be made by resolution of the directors, and notice of such resolution is forthwith to be given to such member or members, and the notice in each case shall specify the amount of the call, and whether the same is payable as a contribution to the Ordinary Accident Fund, or as a contribution to the Extraordinary Accident Fund or to the General Expenses Fund, and the time when such call or instalments thereof is or are to be paid, and to whom the same is or are to be paid, and every member shall be bound to pay to the company at the time or times respectively and place so fixed the amount of every call so made on him, or instalments thereof, and no member shall be entitled to question or dispute any call on the ground that the amount thereof is excessive, or that it is not made in proper proportion, or otherwise, the intention being that the determination of the directors shall be conclusive. Any call in arrears shall carry interest at the rate of 5*l*. per cent. per annum till payment, and the member shall pay such interest to the company accordingly.

A call may be made on a member, notwithstanding that he is dead or bankrupt, the intention being that his estate shall be liable to pay, and that nonpayment by his executors, administrators, or trustee in bankruptcy shall be regarded as a default of such member."

Art. 114. "The power to alter the regulations for the time being of the company, conferred by section 50 of the Companies Act, 1862, is to extend to any and every alteration that may seem expedient, and it is to be no objection to any such alteration that it affects, or may affect the rights from time to time acquired hereunder, whether retrospectively or prospectively."

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[IN THE COURT OF APPEAL.]

NORTHERN THEATRES COMPANY, LIMITED *v.* SHILLITO.

Water—Supply of Water for Domestic Purposes—Private Dwelling-house—Theatre—Persons entitled to demand Supply of Water—Halifax Improvement Act, 1853 (16 & 17 *Vict. c. clxvii.*), *ss.* 59, 63—*Waterworks Clauses Act*, 1847 (10 & 11 *Vict. c.* 17), *ss.* 44, 53.

By s. 58 of the Halifax Improvement Act, 1853, the Halifax Corporation were authorized to supply water within the borough of Halifax and within two miles therefrom, and to sell and dispose of the water as they from time to time thought fit, provided always that the Corporation were not to be compellable to supply water beyond the borough, but might do so by agreement. By s. 59 the Corporation were at the request of the owner or occupier of any private dwelling-house or part of a dwelling-house in any street within the borough in which any water main of the Corporation from time to time was laid, or on the application of any person who under the provisions of the Act was entitled to demand a supply of water within the borough for domestic purposes, to furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at rates not exceeding the rates in the Act specified. By s. 63 the Corporation were authorized to supply any person with water for other than domestic purposes, and to supply with water for domestic purposes any person not entitled under the Act to demand a supply of water for domestic purposes, and to supply water for any purposes beyond the borough, for such remuneration and upon such terms and conditions as might be agreed on between the Corporation and the person desirous of having the supply. By s. 16 the Waterworks Clauses Act, 1847, was incorporated with the Act.

The owners of two theatres situate within the borough of Halifax were supplied by the Corporation with water for domestic purposes. The rates or charges that the Corporation required them to pay were calculated upon the gross estimated rental of the two theatres respectively. The owners had been duly assessed and rated to the consolidated rate in respect of the two theatres, and the charges made for the water were in accordance with the scale of charges which the Corporation were authorized to make. The owners objected to the payment of the rates or charges demanded from them in respect of the years 1921-2, 1922-3, 1923-4 on the ground that the scale of charges applied only to a supply of water to any dwelling-house or part of a dwelling-house, and that a theatre was not a dwelling-house.

On an application to the justices at a petty sessions for orders for the payment of the rates claimed the justices made the order asked for, but on the application of the owners stated a case for the opinion of the Court. The Divisional Court held that there were ample materials on the facts stated from which an agreement to pay the ordinary charges for water supplied for domestic purposes could be inferred

and dismissed the appeal. On appeal it was admitted that the question as to an implied agreement was not raised before the justices:—

Held, that it was not open to the Divisional Court to deal with any question of agreement between the parties or with anything but the bare question of the right of the Corporation to rate.

Trowbridge Water Co. v. *Wilts County Council* [1909] 1 K. B. 824 distinguished.

Held, also, that a theatre was not a dwelling-house within the meaning of s. 59 of the Halifax Act.

Dicta of Cotton, Lindley and Bowen L.JJ. in *Cooke* v. *New River Co.* (1888) 38 Ch. D. 56, 63, 66, 71, as to the meaning of dwelling-house, held not of general application.

Held, further, that having regard to the terms of s. 59 of the Halifax Act, s. 53 of the Waterworks Clauses Act, 1847, must be limited in effect to the owners and occupiers of private dwelling-houses.

Bristol Guardians v. *Bristol Waterworks Co.* [1912] 1 Ch. 111, 846 followed.

Held, therefore, that the owners of the theatres were not persons who were entitled to demand a supply of water under s. 59 of the Halifax Act, and consequently were not liable to be rated under that section in respect of water supplied to them, but that they fell within s. 63 of that Act as persons to whom the Corporation might supply water upon such terms and conditions as might be agreed upon between the Corporation and the persons desirous of having the supply.

Decision of the Divisional Court reversed.

APPEAL from a decision of a Divisional Court on a case stated by the justices of the county borough of Halifax under 20 & 21 Vict. c. 43, s. 2, and 42 & 43 Vict. c. 49, s. 33.

The case stated that three complaints were preferred, that on October 20, 1921, December 13, and October 25, 1923, respectively, by William Shillito (thereinafter called "the respondent"), assistant overseer of the poor of the parish of Halifax and collector of the rates and water charges of the said county borough, against the Northern Theatres Company, Ld. thereinafter called "the appellants"), that the appellants were duly rated and assessed to the consolidated rate of the said parish and to the water charges in respect of certain premises known as the Grand Theatre and the Theatre Royal, both situate in Halifax, in the sums following, that was to say, water charges 63*l.* 3*s.* 4*d.*, 48*l.* 11*s.* 4*d.* and 153*l.* 19*s.* 4*d.*, and had not paid the same and had refused to do so, which complaints were heard and determined by the justices at a petty sessions on March 19, 1924, and the respondent having allowed a credit reducing the amount of 48*l.* 11*s.* 4*d.* to

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32*l.* 0*s.* 8*d.* upon such hearing they ordered the appellants to pay the aforesaid sums of 63*l.* 3*s.* 4*d.*, 32*l.* 0*s.* 8*d.* and 153*l.* 19*s.* 4*d.* with interest of 13*l.* 7*s.* 8*d.* and costs 15*s.*

Upon the hearing of the complaints the following facts were proved or admitted :—

(*a*) That the appellants were duly rated and assessed to the consolidated rate in respect of the Grand Theatre and the Theatre Royal; that they had in fact been supplied with water by the respondents.

(*b*) That the gross estimated rental of the Grand Theatre for 1921-2 was 650*l.*, for 1922-3 520*l.*, and for 1923–4 800*l.*

(*c*) That the gross estimated rental of the Theatre Royal for 1921–2 was 775*l.*, for 1922–3 620*l.*, and for 1923–4 1160*l.*

(*d*) That the charges for water were in accordance with the scale of charges made by the Corporation for water supplied for domestic purposes.

(*e*) That the amounts due according to the before mentioned scale were 63*l.* 3*s.* 4*d.*, 48*l.* 11*s.* 4*d.* and 153*l.* 19*s.* 4*d.*, less 16*l.* 10*s.* in respect of the years 1921–2 and 1922–3 which the appellants were entitled to be credited with.

(*f*) That the said amounts had been demanded and the appellants had refused to pay the same.

(*g*) That the said sums were still unpaid.

(*h*) That the respondents had based their scale upon the gross estimated rental of the premises supplied.

(*i*) That the charges were due for the years 1921–2, 1922–3 and 1923–4.

(*j*) That the respondent was entitled to charge interest at the rate of 5 per cent. per annum on all water charges unpaid (s. 47, Halifax Water and Gas Extension Act, 1876).

The respondent contended (inter alia) :—

(1.) That the scale for water was rightly based on the gross estimated rental (pursuant to the provisions of the Halifax Improvement Act, 1853, the Local Government Board's

Provisional Orders Confirmation (No. 9) Act, 1892, the Local Government Board's Provisional Orders Confirmation (No. 1) Act, 1918, and the Ministry of Health's Order made thereunder dated November 11, 1919).

(2.) That the water was supplied for domestic purposes, and that if the water or any part thereof was used for other than domestic purposes the charges in accordance with the scale of charges made in pursuance of the provisions of the Halifax Corporation Water Acts would have exceeded the charges now made by the amount of a meter rent.

The appellants contended (inter alia) :—

(1.) That the scale of charges applied only to a supply of water to any dwelling-house or part of a dwelling-house, and did not apply to these premises.

(2.) That the premises were used for the purpose of trade, manufacture or business.

(3.) That the charges were unfair and unequal.

(4.) That where a local authority supplied water under a private Act or under a public Act with varying scales of charges, they were bound to take that scale which was most economical to the consumer.

(5.) That the local authority were not on any of the cases entitled to charge on the gross estimated rental.

(6.) That there was no resident caretaker on either of the premises.

The justices were of opinion that the water was used for domestic purposes; that the respondents were correct in basing their water charges on the gross estimated rental (Halifax Improvement Act, 1853, the Local Government Board's Provisional Orders Confirmation (No. 9) Act, 1892, the Local Government Board's Provisional Orders Confirmation (No. 1) Act, 1918, and the Ministry of Health's Order made thereunder and dated November 11, 1919, and they accordingly made orders for payment.

The question for the opinion of the Court was whether upon the above statement of facts the justices came to a correct determination in point of law and, if not, what should be done in the premises.

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The Divisional Court (Lord Hewart C.J., Avory and Salter JJ.) held that there was ample materials in the case from which an agreement to pay the ordinary charges for water supplied for domestic purposes based on the gross estimated rentals might be inferred and dismissed the appeal.

The appellants appealed. The appeal was heard on February 13, 16, 17, 1925.

Lowenthal for the appellants. The question is whether the appellants are liable to be assessed under the Halifax Improvement Act, 1853 (1), in respect of the supply of water to their theatres. The point on which the Divisional Court decided the case was never raised before the justices. The Corporation are seeking to rate these theatres for water for domestic purposes as if they were private dwelling-houses.

(1) Halifax Improvement Act, 1853, s. 3: "The limits of this Act for the supply of water shall be the municipal borough of Halifax, and all places within two miles therefrom."

Sect. 16: "'The Waterworks Clauses Act, 1847,' shall be incorporated with this Act, and the expression 'the undertaking' in that Act includes the existing waterworks and the waterworks by this Act authorized."

Sect. 58: "Subject to the powers and provisions of this Act, the Corporation may, by means of the waterworks, collect and store water, and may supply water within the borough of Halifax and within two miles therefrom, and may sell and dispose of the water as they from time to time think fit: Provided always, that the Corporation shall not be compellable to supply water beyond the borough, but may do so by agreement."

Sect. 59: "The Corporation shall, at the request of the owner or occupier of any private dwelling-house or part of a private dwelling-house in any street within the borough in which any water main of the Corporation from time to time is laid, or on the application of any person who under the provisions of this Act is entitled to demand a supply of water within the borough for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic purposes at rates not exceeding the rates in this Act specified."

Sect. 62 specified the rates to be charged for the supply for domestic purposes. These were modified by later Acts and Provisional Orders.

Sect. 63: "The Corporation from time to time may supply any person with water for other than domestic purposes, and may supply with water for domestic purposes any person not entitled under this Act to demand a supply of water for domestic purposes, and may supply water for any purposes beyond the borough, for such remuneration and upon such terms and conditions as may be agreed on between the Corporation and the person desirous of having the supply."

It is submitted that on the construction of the Halifax local Act the Corporation have no power to assess the appellants in respect of water supplied to these theatres, and that the appellants if they desire a supply must make an agreement with the Corporation.

The Halifax Act creates only one case in which the Corporation may assess a receiver of water on the gross estimated rental of the premises supplied and that is in respect of a supply of water to a private dwelling-house. The claim in the present case was for such a rate under s. 59 of the Halifax local Act. As the premises in question are theatres and not dwelling-houses the claim ought to have failed.

[SCRUTTON L.J. Can the Corporation refuse to supply the appellants, except at domestic rates ?]

The only obligation on the Corporation is to supply dwelling-houses. They could refuse to supply the appellants at any price. Here the appellants are paying enormous sums for water for their theatres and using very little. This is not the case of a supply to a dwelling-house for domestic purposes and it cannot therefore be measured by an assessment. It is not denied that where water is supplied to a dwelling-house an agreement ought to be implied on the part of the owner or occupier to pay the proper charges.

Sects. 35, 44, 48, 53 of the Waterworks Clauses Act, 1847, have no application to the present case. They all deal with the case of a supply to a dwelling-house.

The only section of the Halifax local Act which has any bearing on the present case is s. 63, which authorizes the Corporation to enter into an agreement with a person desiring a supply upon such terms as may be mutually agreed upon.

It is submitted that the whole scheme of the Halifax Act is one dealing with private dwelling-houses only and that theatres are not private dwelling-houses within the meaning of the Act: *Bristol Guardians* v. *Bristol Waterworks Co.* (1) In that case Cozens-Hardy M.R. said (2): " If the word ' private ' is disregarded and treated as of no effect, the owner of every

(1) [1912] 1 Ch. 111, 846. (2) Ibid. 858.

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warehouse or factory which requires a small amount of water for sanitary purposes will be bound to pay the water rate calculated upon its annual value in addition to a special charge for any water used for trade purposes. This will throw an enormous burden upon the inhabitants of Bristol."

The appellants are contesting the point that the Corporation can rate them at all.

The decision of the Divisional Court was, it is submitted, wrong.

Cave K.C. and *J. Willoughby Jardine* for the respondent. It is important to remember what the case was before the justices. The appellants were persons who had received a supply of water for a number of years and had paid the charges demanded. Disputes then arose.

[POLLOCK M.R. You had better confine yourself to the case stated.]

The case was never submitted to the respondent. In the case as originally settled there was a finding that the appellants were entitled to demand a supply of water. The case is a little unfortunate in its shape. In *Knight* v. *Halliwell* (1) it was held that the Court would hear and determine questions of law arising on the facts stated by the justices under 20 & 21 Vict. c. 43, s. 6, although they were not taken before the justices or expressly reserved for the consideration of the Court, and that case was followed in *Kates* v. *Jeffery*. (2) It is admitted that the point as to there being an agreement to be implied from the conduct of parties was not taken before the justices, but it is submitted that it must be inferred from the fact that the appellants received a supply of water and paid for it. Sect. 62 of the Halifax local Act refers to dwelling-houses as well as private dwelling-houses. There is every necessary fact to be found in the case to enable the Court to determine the question. In *Trowbridge Water Co.* v. *Wilts County Council* (3) it was held that the local education authority had power to enter into a contract for the supply of water necessary for the maintenance of a school,

(1) (1874) L. R. 9 Q. B. 412. (2) [1914] 3 K. B. 160.
(3) [1909] 1 K. B. 824.

and that there was evidence upon which the county court judge might properly find that they had made the contract with the water company.

[POLLOCK M.R. We think on the case stated you will have great difficulty in making out an implied agreement.]

In the present case the water must have been taken by the appellants, either (1.) under the local Act, or (2.) under an implied agreement, or (3.) illegally.

It is submitted that the only basis on which the appellants could have taken the water was that they were persons who were entitled to demand a supply. The proviso in s. 58 of the Halifax local Act that the Corporation should not be compellable to supply water beyond the borough but might do so by agreement points to an intention that every person in the borough should be supplied with water irrespective of the purpose for which it was to be used. There was an inherent obligation on the Corporation to supply all persons in the borough with water.

The strongest case in the respondent's favour as to the meaning of the word "dwelling-house" is *Cooke* v. *New River Co.* (1), where there are dicta of members of the Court of Appeal to the effect that any house in which water is required for domestic purposes is a " dwelling-house " within the meaning of the special Act, though no person sleeps or takes meals there.

In *South-West Suburban Water Co.* v. *St. Marylebone Union* (2) a school was held to be a dwelling-house within the meaning of the Waterworks Clauses Acts, and it is submitted that a theatre is equally a dwelling-house for this purpose.

Lowenthal in reply. The case for the respondent is that the words in s. 59 of the Halifax local Act brings in s. 53 of the Water Clauses Act, 1847, and that although s. 59 refers only to private dwelling-houses, its proper construction is that it means any dwelling-house which requires water for domestic purposes. That, it is submitted, is not correct. It is entirely contrary to s. 63 of the Halifax local Act, and to

(1) 38 Ch. D. 56, 63, 66, 71. (2) [1904] 2 K. B. 174.

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so hold would be to do what Cozens-Hardy M.R. deprecated in *Bristol Guardians* v. *Bristol Waterworks Co.* (1)—namely, to throw an enormous burden upon the inhabitants of Halifax.

[POLLOCK M.R. We come back to s. 59 of the Halifax Act, which presses me.]

Sect. 16 of that Act incorporates the Waterworks Clauses Act, 1847. Here there is a local Act which provides that water shall be supplied to every private dwelling-house. Sect. 63 of that Act contemplates that there would be persons who would not be entitled to call for a supply for domestic purposes. It is hardly conceivable that a theatre could properly be said to be a dwelling-house. The rates enumerated in s. 62 of the Halifax local Act and in the Schedule to the Order, November, 1919, are rates which relate to dwelling-houses.

[He also referred to Michael & Will's Gas and Water, 6th ed., p. 475n.]

Cur. adv. vult.

March 3. The following written judgments were delivered :

POLLOCK M.R. This is an appeal from a judgment of the Divisional Court upon a case stated by the justices for the county borough of Halifax.

The appellants, the Northern Theatres Company, Ld., were summoned before the justices by the respondent, who is the assistant overseer of the poor of the parish of Halifax and collector of the rates and water charges of the county borough, on account of their failure to pay water rates or charges demanded from them in respect of the years 1921–2, 1922–3, and 1923–4. From the facts found in the case stated, it appears that the appellants were the owners of the Grand Theatre and the Theatre Royal within the said borough, and that a supply of water for domestic purposes had been made to the theatres during the years above mentioned by the Corporation, who are the water authority

(1) [1912] 1 Ch. 846, 858.

for the borough ; that the rates or charges demanded by the Corporation, which the appellants refused to pay, were calculated upon the gross estimated rental of the two theatres respectively ; that the appellants had been duly assessed and rated to the consolidated rate of the borough in respect of the two theatres ; and that the charges made for the water were in accordance with the scale of charges which the Corporation were authorized to make.

The appellants resisted the demands made upon them, upon the ground that they ought not to be charged for the water supplied to the theatres upon the basis of their gross estimated rental, which they claim raised the charges to a sum wholly disproportionate to the water consumed.

We were told that the present case is the outcome of a long standing dispute between the Corporation and the theatres. The Corporation maintain that they are entitled to charge the theatres for this water used for domestic purposes on the same basis as if it were consumed in a private dwelling-house, while the theatres dispute this basis as inapplicable to theatres where there is no resident caretaker, and where the amount of water consumed is far below the proportion used in a private dwelling-house, while the rating and assessment is higher.

The justices made an order for the payment of the charges claimed. Upon the appeal the Divisional Court determined the case upon the basis that the justices had rightly inferred that there was an implied agreement to pay for water actually supplied on the basis of gross rateable value. This view was not argued before the justices and their findings of fact do not appear to be so directed as to enable this to be done. It is not a question of law arising upon the facts stated, as in *Knight* v. *Halliwell* (1), which was cited to the Court. Avory J. had some doubt whether the appellants came within s. 59 of the local Act, to which I will refer later, or could be charged to the sums demanded of them; but he agreed in the decision of the Court, which was based upon *Trowbridge Water Co.* v. *Wilts County Council.* (2) Further

(1) L. R. 9 Q. B. 412. (2) [1909] 1 K. B. 824.

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Pollock M.R.

examination of that case has led me to the opinion that it is not applicable to the present case. The only question there was, who was the person who ought to pay the rates: was it the local education authority or the managers of the school? There was no question raised as to the basis on which assessment and payment were to be made. It is clear from the contentions raised here on either side and recorded in the case, that the real dispute is as stated above, and not merely a question whether A. or B. is the right party to the contract, and liable to pay the unquestioned charges.

In my judgment, therefore, we must consider what are the powers of the Corporation towards these theatres. Their powers are given by the Halifax Improvement Act, 1853. By s. 3 the limits of the Act for the supply of water are the municipal borough of Halifax and all places within two miles therefrom. Within this area, the Corporation may by s. 58 supply water and may sell and dispose of water, but the Corporation are not compellable to supply water beyond the borough, though they may do so by agreement, and on terms agreed under s. 63. Then comes s. 59, which requires the Corporation to furnish a sufficient supply of water for domestic purposes at rates specified in the Act: (*a*) at the request of the owner or occupier of any private dwelling-house or part of a private dwelling-house in any street within the borough in which any water main of the Corporation from time to time is laid; (*b*) on the application of any person who under the provisions of the Act is entitled to demand a supply of water within the borough for domestic purposes.

The Waterworks Clauses Act, 1847, is by s. 16 incorporated with the Act of 1853.

It is not disputed that the demands for payment in the present case are made under the powers given by the Public Health Act, 1875, for the sums calculated under s. 62 of the Act of 1853 as modified by subsequent legislation which introduces a scale of charges set out in a schedule dated November 11, 1919, based on the gross estimated rental of the premises supplied: but the power to make this demand is limited to payments for supply of water furnished within

the borough for domestic purposes to those to whom there is laid upon the Corporation the obligation to supply them under s. 59. The theatres are not private dwelling-houses within that part of the section cited above under (*a*). It is not easy to see who are the persons indicated under (*b*) unless it be those who are referred to in ss. 44 and 53 of the Act of 1847. By s. 44 the Corporation must lay down communication pipes and supply water for domestic or other purposes to dwelling-houses of less than 10*l*. annual value, upon request of the occupier, with the consent of the owner, and upon payment in advance of the proportion of the water rate in respect of such house in any street in which pipes have been laid down by the Corporation; and by s. 53 they must supply water for domestic purposes to dwelling-houses without limit of value, if the owners or occupiers lay down the necessary communication pipes and pay or tender the appropriate rates. The persons indicated under category (*a*) are those who occupy private dwelling-houses in a street where a water main is laid, while category (*b*) embraces those whose dwelling-houses the Corporation are compelled to join up with their supply laid down in the street in which they are situate (s. 44) or those whose dwelling-houses are not in a street where a main is already laid, but are prepared and able to incur the expenses and to connect up with a main to obtain a supply for domestic purposes only. In 1853 it is possible that this latter class were not inconsiderable in number.

In *Cooke* v. *New River Co.* (1) there is a dictum by Lindley L.J. indicating that for the purpose of the section which had there to be construed "anything is a dwelling-house . . . . which is a house, and in which water is required for domestic purposes, or for any other purposes for which rates are fixed." Cotton L.J. (2) shared this view, nor did Bowen L.J. dissent from it, though he, like his colleagues, expressly refrained from deciding the point. Bowen L.J. said (3) of obiter dicta generally that they, like the proverbial

(1) 38 Ch. D. 56, 66. (2) Ibid. 63.
(3) Ibid. 71.

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chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the judges who have uttered them, and are a great source of embarrassment in future cases. Those dicta were obiter and cannot be accepted as binding in the present case.

The effect and range of s. 53 of the Act of 1847 was discussed in *Bristol Guardians* v. *Bristol Waterworks Co.* (1), where it was held that in view of the terms of a section in the local Act, s. 53 must be limited in effect to the owners and occupiers of private dwelling-houses. The section in the local Act was not in the same terms as s. 59 in the Halifax Act of 1853; but the reasoning upon which Eve J.'s judgment is based, which was supported in the Court of Appeal, appears to me to afford a guide to the present question. It was there held that the effect of s. 53 must be cut down so as to accord with the terms of the special local Act, and to apply to private dwelling-houses only.

Part (*a*) of s. 59 refers to private dwelling-houses only, which are specifically mentioned. If the meaning of part (*b*) is not similarly restricted, then dwelling-house in s. 53 covers and introduces into s. 59 all houses, whether private or not. If the meaning of part (*b*) of s. 59 is so wide, there seems no reason why the section should have been drawn as it is. On the other hand the separation into the two categories may emphasize the distinction drawn between private dwelling-houses in streets already provided with a main, and small private dwellings which the Corporation were bound to join up, and private houses of such a sort as were ready to provide the means of taking a supply of water. In my judgment, therefore, s. 53 must be restricted, as in the *Bristol* case (1), to private dwelling-houses. This reading of the Act excludes the owners of the theatres from s. 59.

But even if the meaning of dwelling-house in s. 53 is not so restricted, the case has not found that the theatres had fulfilled the conditions laid down in, or made the demand under, that section of the Act of 1847, and so they are not within category (*b*), with the consequence that s. 62 of the

(1) [1912] 1 Ch. 111, 846.

Halifax local Act of 1853 and the present scale of charges are not applicable. The answer therefore to the question in the case stated must be that the justices did not come to a correct determination in point of law and the summonses ought to have been dismissed. The further consequence must be stated—namely, that the owners of the theatres are not entitled to demand a supply of water but fall within s. 63 as persons to whom the Corporation may supply water upon such terms and conditions as may be agreed on between the Corporation and the persons desirous of having the supply.

It is to be hoped that such an agreement may now be reached without further controversy.

The appeal must be allowed with costs here and below, and the case remitted to the justices to be dealt with accordingly, and there will be liberty to apply.

SCRUTTON L.J. This is an appeal as to the basis of liability of two theatres at Halifax to water rate as decided by the Divisional Court on a case stated by magistrates. The Divisional Court have held that the theatre company are bound to pay on a particular basis, on the ground that there is either an express or implied agreement to that effect on the authority of the *Trowbridge* case. (1) But in that case there was no dispute as to basis of payment, but only as to person liable to pay. In the present case the magistrates do not seem to have considered any question of agreement, which it is admitted was not argued before them. Indeed counsel for the Corporation opened his case by stating: "This dispute is a matter which has been going on for a very long period"—hardly a promising subject for an implied agreement. The case as stated does not raise any question of agreement, or state any facts relevant to the question, and it is obvious that the real dispute is as to the construction of the statutes, and the basis on which the theatres which use some water for domestic purposes must pay, whether in proportion to water supplied, or on their rateable or rental values as theatres, or on some and what other basis.

(1) [1909] 1 K. B. 824.

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I think, therefore, the ground on which the Divisional Court decided in favour of the water authority cannot be supported, and we are remitted to the question stated by the case as to the true construction of the statutes and Orders in relation to the facts stated.

Sect. 59 of the Halifax Improvement Act, 1853, imposes an obligation on the Corporation to supply water: (1.) to certain defined "private dwelling-houses" within the borough; (2.) "or on the application of any person who under the provisions of this Act is entitled to demand a supply of water within the borough for domestic purposes"; (3.) as to both classes, at rates not exceeding the rates in this Act specified. This refers to s. 62 of the Act, which has been amended by certain later Acts and Provisional Orders.

Sect. 63 of the local Act empowers the Corporation to supply by agreement and on agreed terms: (1.) any person with water for other than domestic purposes; (2.) as to water for domestic purposes any person not entitled under this Act to demand a supply of water for domestic purposes; (3.) water for any purposes outside the borough. The question is, under which class these theatres come?

They are not "private dwelling-houses" under s. 59. Are their owners under the same section "persons under the provisions of this Act entitled to demand a supply of water for domestic purposes"? These persons, as the class are mentioned separately, would expect to be some one different from the owner of a private dwelling-house. The appellants were unable to suggest on their construction to whom these words referred. They faintly argued that they might refer to the persons mentioned in s. 41, but these persons were apparently entitled to "appropriate" their water free of charge. After various changes of front, the respondent suggested that as the Waterworks Clauses Act, 1847, was by s. 16 of the local Act incorporated in it, the answer could be found in that Act. A somewhat similar question had been considered in this Court in *Bristol Guardians* v. *Bristol Waterworks Co.* (1), where the majority of this Court (Fletcher

(1) [1912] 1 Ch. 846.

Moulton L.J. dissenting) held that the provisions of the Waterworks Clauses Act as to persons entitled to a supply were not incorporated in the Bristol Act as being inconsistent with express provisions, though the Waterworks Clauses Act was incorporated. But in that case the charging section in the local Act (1) only referred to private dwelling-houses and omitted any reference to "persons entitled to a supply." Here these words are added to s. 59, and should have a meaning given to them. As stated by Lord Macnaghten in *Cooke Sons & Co.* v. *Governors and Company of New River* (2) one would expect in a water Act passed in 1853 and incorporating the provisions of that Act to find the scheme of the Waterworks Clauses Act compelling the Corporation to supply householders in their district with water for domestic purposes, carried out. The Waterworks Clauses Act by s. 44 requires the undertakers to lay down communication pipes and supply water to dwelling-houses of less than 10*l.* annual value in certain conditions, and by s. 53 to supply water to dwelling-houses over that value whose owners lay communication pipes and pay the rates. These persons appear to me to be the "persons entitled to demand water" mentioned in s. 59, with the result that owners of "dwelling-houses" complying with certain conditions are added to owners of "private dwelling-houses." It is said this renders the first part of the drafting of s. 59 superfluous, but, on the other hand, the second part of the drafting presumptively was meant to add something, which may well be "dwelling-houses," which are not private dwelling-houses, of which workhouses (*Liskeard Union* v. *Liskeard Waterworks Co.* (3)) or schools (*South-West Suburban Water Co.* v. *St. Marylebone Union* (4)) would be an example.

If then the Waterworks Clauses Act is incorporated, so as to bring in ss. 44 and 53 to explain persons entitled to be supplied in s. 59 of the local Act, the next question is whether a theatre is a "dwelling-house" within the meaning of the Acts, if, though no one sleeps there, water is used thereon for

(1) [1912] 1 Ch. 847*n*.
(2) (1889) 14 App. Cas. 698, 705.
(3) (1881) 7 Q. B. D. 505.
(4) [1904] 2 K. B. 174.

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domestic purposes. On this point it is necessary seriously to consider the obiter dicta of the three members of the Court of Appeal who heard the case of *Cooke* v. *New River Co.* (1) The house there was a carpet factory, in which water was supplied for drinking and sanitary purposes, though no one slept or had his meals there. The occupiers demanded a supply of water by meter; the Court of Appeal held that they had no such right for all the purposes for which they used water, but incidentally all the members of the Court expressed opinions as to whether such a factory was a "dwelling-house" within the New River Company's Act, 1852. Cotton L.J. says (2): "But I think (though we do not decide the point, as it is unnecessary to do so) that in this section 'dwelling-house' is used for any house which is so far adapted for the purposes to which a dwelling-house is usually adapted as to require water for domestic purposes, though it may not be a dwelling-house within the meaning of other Acts of Parliament." Lindley L.J. says (3): "I am disposed to think that anything is a dwelling-house within the meaning of this section, which is a house, and in which water is required for domestic purposes, or for any other purposes for which rates are fixed. I do not think it necessary to decide that question, but my impression is very strong that the plaintiffs are within the wording of this section, and are entitled under it to a supply of water for domestic purposes under the schedule of rates in the section." Bowen L.J. says (4): "They occupy a house which is six storeys high, without any internal partitions, nobody sleeps in the house, nobody takes his meals in it, there are about twenty clerks and twenty porters employed there, and water is used for water-closets and lavatories, and for washing the house. I neglect the hydraulic lift. I by no means say that such persons are not occupying a house or part of a house which gives them a right under s. 35 to water for domestic purposes."

It is true these statements are obiter, and the House of Lords affirmed the decision on different grounds, Lord

(1) 38 Ch. D. 56.
(2) Ibid. 63.
(3) Ibid. 66.
(4) Ibid. 71.

Macnaghten expressly reserving the question of the meaning of " dwelling-house."

In *Colley's Patents, Ld.* v. *Metropolitan Water Board* (1) the House of Lords held that " domestic purposes " included water supplied for drinking and sanitary purposes to a factory, but the Act in question related to " houses," not " dwelling-houses." I have given these expressions of opinion all the consideration that expressions of such learned judges deserve, but I do not feel able to follow them. No one in ordinary language would call a theatre where no one sleeps a " dwelling-house " or a " residence " : it is a place of business to the actors, of entertainment to the audience ; and I think if it is intended to include it in the " dwelling-houses " which can demand a supply of water, but must pay on the basis of their annual value, not of the amount of water supplied, clear words must be used. I do not feel able to extend the words " dwelling-house " to cover theatres or factories, though they use some water for domestic purposes. The result is in the present case that the Corporation are not entitled under the statute in the absence of agreement to charge the owners of the theatres for water supplied for domestic purposes at a percentage on gross estimated rentals. It appears also to follow that the theatres are not entitled to a supply of water for domestic or trade purposes except on terms agreed with the Corporation. One may express the hope that both sides may be reasonable, though they have fought, and that the Corporation will ascertain what other similar corporations do in the matter of water supply to theatres and consider whether they should adopt a similar line of action.

Meanwhile the appeal must be allowed with costs here and below, and the question asked in the case answered in the negative on the ground that the Corporation were not, in the absence of agreement, correct in basing their water charges on the gross estimated rentals of the theatres.

SARGANT L.J. In my judgment, the only question that we have to decide on this special case is whether the Halifax

(1) [1912] A. C. 24.

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Improvement Act, 1853, gave the Halifax Corporation statutory power to rate the owners or occupiers of ordinary theatres, such as those of the appellants, for the supply of water for domestic purposes upon the basis of their rental value. Since the passing of that Act some slight changes have been made in the basis of charge and otherwise by subsequent legislation or its equivalent, as referred to in para. 5, sub-para. (*b*), of the special case. But there has not been any enlargement or alteration of the subject matter rendered liable to rating under the Act of 1853: and it is that Act, therefore, that alone has to be considered for the present purpose.

Sect. 59 of that Act is the section imposing the obligation on the Corporation to supply water at rates not exceeding those specified in the Act. Sect. 62 is the section specifying the rates of charge, such rates having subsequently been slightly modified. And s. 63 gives a power to the Corporation to supply water by agreement to persons and for purposes outside the statutory obligations of the Corporation. It is, therefore, to s. 59 that one has to look in order to ascertain the persons whom the Corporation have statutory power to rate.

Now s. 59 mentions two classes of persons entitled to be supplied for domestic purposes—namely, first, the owners or occupiers of any private dwelling-houses or parts of private dwelling-houses in any street within the borough in which any water main of the Corporation from time to time is laid, and, secondly, any persons who, under the provisions of the Act, are entitled to demand a supply of water within the borough for domestic purposes. It is rather difficult to discover who are the persons falling within this second class. They cannot, I think, be those mentioned in s. 41 of the Act itself, for the supply under that section is apparently free. But they may very possibly be, as suggested by Avory J. in his judgment, persons entitled to be supplied under s. 53 of the Waterworks Clauses Act, 1847 (which is incorporated with the Act of 1853), or under s. 44 of that Act; and I will assume in favour of the respondents that these are the persons referred to.

But even so, the only persons brought in are the owners or occupiers of dwelling-houses, and indeed, it may be of private dwelling-houses only, for it would be odd if, for instance, an owner or occupier should be brought in under s. 53 of the incorporated Act, when his house was of a class which could not have been brought in under s. 59 of the private Act had it been actually in a street in which a main had been laid. And *Bristol Guardians* v. *Bristol Waterworks Co.* (1) is a strong authority against using the wider and more general language of an incorporated general clauses Act for the purpose of enlarging the narrower and more definite scope and subject matter of a particular incorporating private Act.

But even if the Halifax Act of 1853 is so interpreted as to bring within its scope, as the subject matter of the obligation to supply and of the power to rate, not private dwelling-houses only but dwelling-houses generally, are ordinary theatres within the description of dwelling-houses? As a matter of the use of ordinary language the answer must obviously be in the negative, and that whether the supply is for domestic purposes or not.

Some stress has been laid by the respondents here on the judgments in *Cooke* v. *New River Co.* (2) But the decision in that case obviously turned on the particular language of the private Act then in question, which differed most materially from the language in the Act which we have now to construe. And it would be wrong, especially in view of the judgment of Bowen L.J., to treat that case as establishing a general judicial determination of the word "dwelling-house" as including a factory or a theatre when supplied with water for domestic purposes. I can find nothing in the Halifax Act of 1853 to justify the extension of the phrase or word "private dwelling-house" or "dwelling-house" so as to include a factory or theatre of the ordinary kind.

The Divisional Court, as I read their judgments, did not so interpret the word dwelling-house, but based their decision against the appellants rather on the view that there were ample materials in the case from which an agreement might

(1) [1912] 1 Ch. 111, 846. (2) 38 Ch. D. 56.

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be inferred to pay the ordinary charges for water supplied for domestic purposes. But, with great respect to that Court, I do not think that it was open to them on the case stated to deal with any question of agreement between the parties, or with anything but the bare question of the statutory right of the Corporation to rate. Counsel for the respondents has very frankly admitted that no question of express or implied agreement was ever raised before the justices. And the appellants desire if and when any such question is raised (as in my opinion it is not raised by the special case) to deal with that question on proper evidence on both sides. It may not be immaterial to observe that, when the present case was opened before the justices, the representative of the respondents began by observing that " this dispute is a matter which has been going on for a very long time," a remark which seems wholly inconsistent with agreement between the parties. And both the demand notes for the water charges and the summons taken out for their enforcement are, on the face of them, based on an obligation to pay a rate, and not on any obligation arising under voluntary contract. The decision in the *Trowbridge Water Co.'s* case (1) is not in my judgment applicable here.

I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Helliwell, Harby & Evershed, for Jubb, Booth & Helliwell, Halifax.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for Percy Saunders, Town Clerk, Halifax.*

(1) [1909] 1 K. B. 824.

W. I. C.

RICHARDSONS AND BRADLEY AND COMPANY, LIMITED *v.* BERNHARD.

1925
March 18, 19.

Appeal—Order in Chambers—Order appointing Arbitrator—Submission to Arbitration by one Party disputed—Matter of Practice and Procedure—R. S. C., Order LIV., *r.* 23.

A contract for the sale of goods was entered into between B., the seller, and R. of London who, so far as appeared from the contract, were the buyers. The contract contained an arbitration clause. The goods delivered in pursuance of the contract were despatched to a foreign firm, who complained of their quality. Thereupon the foreign firm and R., who said they had merely acted as agents for that firm, claimed to have the dispute as to the quality of the goods submitted to arbitration. B., while willing to go to arbitration as between himself and R., refused to assent to an arbitration to which the foreign firm were parties, maintaining that he had sold to R. as principals. R. and the foreign firm then took out a summons for the appointment of an arbitrator pursuant to s. 5 of the Arbitration Act, 1889. The judge in chambers having made an order for the appointment of an arbitrator, B. appealed to the Divisional Court:—

Held, that it being in dispute whether there was a submission between B. on the one hand and R. and the foreign firm on the other, there was no "matter" pending in the High Court as between those parties; that therefore the appeal was not in a matter of practice and procedure within Order LIV., r. 23, and, consequently, that it lay not to the Court of Appeal, but to the Divisional Court.

In re Colman and Watson [1908] 1 K. B. 47 distinguished.

Miller, Gibb & Co. v. *Smith & Tyrer* [1916] 1 K. B. 419 followed.

APPEAL from an order of Branson J. in chambers appointing an arbitrator.

In 1921 two contracts for the sale of goods were entered into between Bernhard, the seller, and Richardsons, of London, who, so far as appeared on the face of the contracts, were the buyers. Each contract contained an arbitration clause. The goods were despatched to the firm of Bradley & Co. at Hong Kong, who complained of their quality. Thereafter Bradley & Co. and Richardsons, who said they had merely acted as agents for Bradley & Co., claimed to have the dispute submitted to arbitration. Bernhard, while willing to go to arbitration as between himself and Richardsons, refused to assent to an arbitration to which Bradley & Co. were parties, maintaining that he had sold to Richardsons

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as principals. As Bernhard refused to concur in the appointment of an arbitrator, Richardsons and Bradley & Co. took out a summons for the appointment of an arbitrator pursuant to s. 5 of the Arbitration Act, 1889. The Master having refused to make the order asked for, Richardsons and Bradley & Co. appealed to the judge, who made an order for the appointment of an arbitrator, and from that order Bernhard now appealed to the Divisional Court.

Clement Davies for Richardsons and Bradley & Co. There is a preliminary objection to the hearing of this appeal. The appeal lies not to the Divisional Court but to the Court of Appeal, because this is a matter of practice and procedure within Order LIV., r. 23, which says that "in the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a Divisional Court." Sect. 100 of the Judicature Act, 1873, defines "matter" as including "every proceeding in the Court not in a cause." *Watson* v. *Petts* (1) decided that the "matter," for this purpose, must be in the High Court, but the Court of Appeal in *In re Colman and Watson* (2) decided that by virtue of ss. 1 and 27 of the Arbitration Act, 1889, a submission to arbitration must be treated as if it had been made an order of the High Court, and was therefore a "matter," so that in respect of any order made therein an appeal lay direct to the Court of Appeal. [He was stopped.]

Stenham for Bernhard. The appeal is rightly brought to the Divisional Court: *Miller, Gibb & Co.* v. *Smith & Tyrer.* (3) There the Divisional Court held that, where the question was whether or not there was a submission between the particular parties, there was no existing cause or matter pending in the High Court, and therefore that an appeal from the judge at chambers discharging an order for the appointment of an arbitrator lay not to the Court of Appeal but to the Divisional Court. In this case when the

(1) [1899] 1 Q. B. 54. (2) [1908] 1 K. B. 47.
(3) [1916] 1 K. B. 419.

application was made for the appointment of an arbitrator there was no cause or matter pending between Bernhard and Bradley & Co.

Clement Davies in reply. *Miller, Gibb & Co.* v. *Smith & Tyrer* (1) is distinguishable. There vendors sold goods through the agency of brokers, the brokers signing the contract "by the authority of our principals as agents." The contract contained an arbitration clause, and a dispute having arisen, the purchasers called upon the brokers to appoint an arbitrator. The brokers refused to do so, whereupon the purchasers applied for an order for the appointment of an arbitrator. In those circumstances the Court said that there was no cause or matter pending between the purchasers and the brokers. Here, on the other hand, there being in fact a submission, there is a cause or matter pending between Bernhard on the one hand and Richardsons and Bradley & Co. on the other. *In re Colman and Watson* (2) is exactly in point.

BANKES L.J. This matter raises a troublesome question of jurisdiction. I am always loth to decide whether questions of this kind should be decided by one or by another set of judges, but we must endeavour to comply with the rules. The dispute arises in this way: Bernhard, the seller, entered into two contracts with Richardsons for the sale of goods. Richardsons, we are told, carried on an agency business, but so far as the written contracts are concerned they appeared to be the purchasers. It is said, however, that they were acting as agents for Bradley & Co. of Hong Kong. A dispute having arisen as to the quality of the goods, Richardsons and Bradley & Co. joined forces and applied for the appointment of an arbitrator. To this Bernhard objected, contending that he never entered into any contract with Bradley & Co., and that there was therefore no submission to arbitration as between him and them; he had however no objection to the appointment of an arbitrator as between himself and Richardsons. The Master refused to

(1) [1916] 1 K. B. 419. (2) [1908] 1 K. B. 47.

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make any order, but on appeal from his refusal Branson J. held that he was justified, in spite of Bernhard's contention that he had no contract with Bradley & Co., in making an order appointing an arbitrator. From that order Bernhard appeals to this Court, and objection is taken on behalf of Richardsons and Bradley & Co. that this Court has no jurisdiction and that the appeal lies to the Court of Appeal. Had it not been for the decisions I should not have felt much difficulty, but we must be guided by the authorities and are bound by the decisions of the Court of Appeal and must treat with respect and endeavour to follow the decision of a Court of co-ordinate jurisdiction.

By Order LIV., r. 23, it is provided that "in the King's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a Divisional Court." It is said that this is a matter of practice and procedure and therefore that the appeal lies to the Court of Appeal. It is not in dispute that when the rule speaks of a matter of practice and procedure it means practice and procedure in some cause or matter pending in the High Court, and it is said that this application to appoint an arbitrator is a matter in the High Court. Attention has been called to the definition of "matter" contained in s. 100 of the Judicature Act, 1873, and it is said that the question is concluded by *In re Colman and Watson* (1), which raised a very similar, although not exactly the same point as that now raised. In that case there was an agreement between two parties in which the amount of compensation payable by the one to the other was to be fixed by a named person. There was thus no dispute that there was an agreement, the question was as to its legal effect. On the one side it was said that it was a submission to arbitration and within the Arbitration Act; on the other side it was said that it was not within that Act, as the agreement was merely that a third person should assess as a valuer the amount to be paid. Pickford J. at Chambers said that it was a mere agreement for a valuation, but the Court of Appeal took a different view,

(1) [1908] 1 K. B. 47.

and held that there was a submission to arbitration. The Court definitely decided, and we are bound by the decision, that where there is an agreement which in the opinion of the Court amounts to a submission, that submission, by virtue of s. 1 of the Arbitration Act, 1889, is for all material purposes a "matter" in the Court, and as a result the appeal must be regulated in the way directed for appeals in matters of practice and procedure. I express no opinion about that case, except to say that it binds us sitting here, and if it is not distinguishable from the present case we must follow it. Our attention has, however, been called to the later case of *Miller, Gibb & Co.* v. *Smith & Tyrer* (1), where the Divisional Court pointed out and acted upon what appeared to them to be a very material distinction—a distinction of which one can realize the importance. In that case the parties were in dispute not as to the legal effect of an agreement, but whether there was an agreement between them at all, and the Court said that the dispute being whether in fact there was an agreement it could not be said that the decision of that question was a decision in a matter of practice and procedure, because whether there was or was not a "matter" depended upon the decision of that preliminary point. Avory J. there said (2): "In the present case the dispute is whether there ever was a submission between the parties. In order to decide that this appeal lies to the Court of Appeal we should have to decide that there was a submission to arbitration. That is the question between the parties." That I think is exactly the question between the two parties between whom in this dispute this particular question is raised. Upon the authority of that case Bernhard is entitled to contend that although he made an agreement with Richardsons he made no agreement with Bradley & Co., who cannot therefore say that the case is covered by *In re Colman and Watson* (3) or that *Miller, Gibb & Co.* v. *Smith & Tyrer* (1) is distinguishable. The preliminary objection therefore fails.

(1) [1916] 1 K. B. 419. (2) [1916] 1 K. B. 422.
(3) [1908] 1 K. B. 47.

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GREER J. I agree. The question we have to determine is whether an appeal by a contracting party who contends that he never entered into a submission to arbitration is an appeal in a matter of practice and procedure in the High Court. If the party in this case had entered into a submission then upon the authorities that would have been equivalent to a proceeding in the High Court and any subsequent application would be a matter of practice and procedure, but where the very question is whether the litigation, which the Arbitration Act makes a "matter" in the High Court, is or is not commenced, it seems to me impossible to say that an appeal in regard to that is an appeal in a matter of practice and procedure. I agree with Bankes L.J. in the view he has expressed as to *Miller, Gibb & Co.* v. *Smith & Tyrer*. (1) Mr. Clement Davies relied upon *In re Colman and Watson* (2), but that case I think is distinguishable upon the ground that there the Court of Appeal decided that in fact there was a submission. Having decided that, it was clear that the question was a matter of practice and procedure arising in a matter in the High Court. For that reason it was decided that the appeal lay to the Court of Appeal.

Preliminary objection overruled.

[The Court then heard the appeal on the merits, and set aside Branson J.'s order on the ground that Bradley & Co. were not shown to be parties to the contracts.]

Solicitors for Bernhard: *Indermaur & Brown for R. Newton Rhodes & Hall, Bradford.*

Solicitors for Richardsons and Bradley & Co.: *Worthington Evans, Dauney & Co.*

(1) [1916] 1 K. B. 419. (2) [1908] 1 K. B. 47.

J. S. H.

[IN THE COURT OF APPEAL.]

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April 21.

WEIR AND COMPANY *v.* McVICAR AND COMPANY.

Practice—Action against Firm—Service on Defendant as Partner—Appearance under Protest denying Partnership—Application to have Issue of Partnership tried first—Order XLVIII.a., *rr.* 7, 8.

In an action against a firm a person who, being served as a partner, enters an appearance under protest denying that he is a partner in accordance with the provisions of Order XLVIII.a., r. 7, is not entitled to dispute the liability of the firm, and consequently cannot obtain an order for an issue to try the question of his partnership before the other issues in the action.

Quaere, whether a person served as a partner who appears unconditionally is entitled to dispute the fact of his partnership as well as the liability of the firm?

APPEAL from chambers.

In this action, which was for breach of contract, the writ was served upon A. S. Manasseh as a partner in the defendant firm. Manasseh entered an appearance under protest denying that he was a partner, in accordance with the provisions of Order XLVIII.a., r. 7. The writ was also served upon R. J. McVicar, the only other person alleged to be a partner in the firm. As McVicar appeared to be short of funds and about to leave the country Manasseh was afraid that he would not seriously defend the action, and that judgment might go by default. Under these circumstances he took out a summons that an issue might be directed to try whether he was at all material times a member of the defendant firm, and that in the meantime further proceedings in the action should be stayed. The Master, being of opinion, on the authority of *Ellis* v. *Wadeson* (1), that a person served as a partner in an action against a firm could not both deny the fact of his partnership and also the indebtedness of the firm, dismissed the summons, and on appeal the judge at chambers affirmed the Master.

Manasseh appealed.

Rayner Goddard K.C. and *Joseph Nissim* for the appellant. To the general rule that a defendant may set up alternative

(1) [1899] 1 Q. B. 714.

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defences the case of a person who, in an action against a firm, is served as a partner forms no exception. He may allege that the firm is not liable, but that if it is he is not a member of it. This was apparently the rule in 1890, in which year *Davies & Co.* v. *André & Co.* (1) was decided. In that case, which was an action against a firm, the writ was served on one Rath, who did not know in what character he was served. Order IX., r. 6 (now Order XLVIII.a., r. 3), provided that the writ might be served on any one or more of the partners or on the person having the control or management of the business. Rath wrongly supposed that he was served as a partner and entered a conditional appearance denying that he was a partner. In fact the plaintiffs intended to serve him only as manager, and both the Divisional Court and the Court of Appeal treated the service as having been made on him in that character only. Both Wills J. in the Court below and Lord Esher in the Court of Appeal were apparently of opinion that the question whether the person served with a writ in an action against a firm might dispute both the liability of the firm and also the fact of his membership depended on the form of the service. They both said that if he was served as a partner he might do so, and his unconditional appearance would not estop him from afterwards asserting in his pleading that he was not a partner; but if he was served, not as a partner, but as the person in charge of the business, by appearing unconditionally (and the rules then contained no provision for a conditional appearance), he asserted something which the plaintiffs did not allege—namely, that he was a partner, and could not afterwards dispute the partnership. Lord Esher said: "If the writ was served on him (Rath) as a partner, his course was to appear, and, after having appeared, he could make the defence that the firm did not owe the debt, or, if it did, he was not a partner in the firm." And Wills J. had said precisely the same thing in the Court below. But as Rath was not served as a partner he could not take that course, and he was exposed

(1) (1890) 24 Q. B. D. 598, 606.

to the hardship that if he appeared unconditionally he would admit the partnership, and there was strong ground for supposing that, notwithstanding the form of the service, the plaintiffs intended, in the event of judgment going by default, to levy execution on him. Wills J. directed the attention of the Rule Committee to that hardship and suggested that the rule should be amended. The Court of Appeal, however, felt compelled to strike out Rath's conditional appearance, as the rules did not permit it. It was in consequence of that decision that Order XLVIII.a., r. 7 (1), was introduced in 1891. But it cannot have been intended by that rule to take away from a person served as a partner a right which he previously had of disputing the partnership as well as the liability of the firm. The object of the rule was only to enable a person so served to raise the double defence at the earliest possible moment. He could have raised it in his pleading before. Later decisions suggest that that right has been left untouched. In *Western National Bank of New York* v. *Perez, Triana & Co.* (2) the action was against a foreign firm, and the writ was served on one Koppel as a partner. He appeared unconditionally, and then moved to set aside the service on the ground that he was not a partner. The Court of Appeal held that the service should stand, on the plaintiffs amending their writ by stating that Koppel was sued with other alleged members of the firm, naming them separately. Bowen L.J., however, said: "The defendant will be entitled in his defence, if the action proceeds, to avail himself of any defence open at law or equity to a defendant who is sued . . . . on an alleged liability which he disputes"; and that language is wide enough to cover the right to dispute both the partnership and the indebtedness. In *Davis* v. *Hyman* (3)

(1) By Order XLVIII.a., r. 7: "Any person served as a partner under Rule 3 may enter an appearance under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving the firm and obtaining judgment against the firm in default of appearance if no partner has entered an appearance in the ordinary form."

(2) [1891] 1 Q. B. 304, 317.

(3) [1903] 1 K. B. 854, 856.

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the action was on a bill of exchange against Herbert Hyman & Co., and judgment was recovered under Order XIV. The plaintiff obtained from the Master an order for an issue to try whether one Sydney Hyman was liable to execution as being or having held himself out to be a partner in the firm. Phillimore J. struck out the portion of the order relating to holding out. For the defendant it was contended that that was right in view of the fact that a person brought in to defend on the ground that he held himself out to be a partner would not necessarily have any previous notice of the action, and would have no opportunity of raising a defence on the merits. The Court of Appeal restored the Master's order, Stirling L.J. saying that "an issue could, in a proper case, be so framed as to include any proper defence," by which he meant that on the trial of the issue of partnership the defendant might dispute the liability of the firm. That no doubt was obiter, for he added: "No such defence is suggested in the present case." *Ellis* v. *Wadeson* (1) was an action against a firm consisting of two partners A. and B. They appeared unconditionally. After appearance A. died. B. put in a defence, not as a defence of the firm, but in a personal form—"this defendant denies, etc." It was held that that form of defence was wrong in substance, because it precluded execution against the partnership assets, which remained liable notwithstanding A.'s death. But that case is no authority for the proposition for which the Master here relied on it—namely, that a person served as a partner cannot defend both on the issue of partnership and on that of liability of the firm, for there the question did not arise, the partnership being admitted. Then if Manasseh can raise both defences he ought to be allowed to have the issue of partnership tried first. In the Annual Practice for 1925, at p. 826, it is said that "If a person served as a partner appears under protest under r. 7, and the plaintiff desires to contest his denial of partnership . . . . if necessary an issue may be directed to determine the question of

(1) [1899] 1 Q. B. 714.

partnership: Order XXXVI., r. 4." That must mean that that question may be directed to be determined before the other issues. But if the plaintiff is entitled to have the issue of partnership tried first, equally must the defendant be so entitled. Moreover by r. 8 of Order XLVIII.a.: "Where a judgment or order is against a firm execution may issue (*b*) against any person . . . . who has been adjudged to be a partner." That presumes that he has been so adjudged at some earlier date on an issue specially directed for that purpose.

Bensley Wells for the respondents was not called upon.

BANKES L.J. This is an appeal from Fraser J. affirming the Master, who held that he had no jurisdiction to make the order asked for. The plaintiffs brought an action against McVicar & Co. in their firm name, and served the writ upon two persons as being partners in that firm, Mr. McVicar and the appellant Mr. Manasseh. The appellant being desirous of disputing the partnership entered an appearance under protest under Order XLVIII.a., r. 7, denying that he was a partner. But being also apprehensive that McVicar did not intend seriously to defend the action he asked that the question whether he, Manasseh, was a partner should be ordered to be tried before the action was allowed to proceed against the firm. The question we have to decide is whether the rules allow of such an order being made. It appears to me clear from the amendment of the rules which was made in consequence of the decision in *Davies & Co.* v. *André & Co.* (1) that they do not. In that case the plaintiff sued André & Co. in their firm name and served the writ upon one Rath, who, thinking that he had been served as a partner, entered a conditional appearance denying that he was a partner, and he subsequently delivered a defence in which he disputed the partnership and also challenged the liability of the firm. An application was then made by the plaintiff to strike out the appearance. At that date there

(1) 24 Q. B. D. 598.

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was no rule authorizing a person served with a writ in an action against a firm to enter a conditional appearance, and Order XLII., r. 10, provided, as Order XLVIII.a., r. 8, does now, that where a judgment is obtained against a firm execution may issue against any person who has been served as a partner and failed to appear, and that "if the party who has obtained judgment or an order claims to be entitled to issue execution against any other person as being a member of the firm he may apply to the Court or a judge for leave to do so, and the Court may give such leave if the liability be not disputed, or if such liability be disputed may order that the liability of such person be tried and determined." Wills J. thought it was a hardship that a person who was served with a writ in an action against a firm and who desired to dispute the liability of the firm should only be allowed to do so on the terms of his admitting the partnership, and that he should be put to his election which defence he would set up; for in the event of his failing to establish that he was not a partner, if judgment had been entered against the firm by default he would be liable to have execution issued against him under that rule for the full amount of the claim. He accordingly suggested that the Rule Committee should amend the rule by empowering the judge, when directing the trial of the issue of partnership under Order XLII., r. 10, to give the defendant leave to dispute the claim as well as the fact of partnership. In the following year, 1891, the Rule Committee amended the rule by introducing Order XLVIII.a., r. 7, by which "Any person served as a partner under Rule 3 may enter an appearance under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving the firm and obtaining judgment against the firm in default of appearance if no partner has entered an appearance in the ordinary form." That rule allowed of the entry of a conditional appearance, but subject to the liability that if judgment be obtained against the firm execution may issue against the defendant so conditionally appearing if it be proved that he is a member

of the firm, just as it could before. The Committee, having had their attention expressly directed to the matter, refused to adopt Wills J.'s suggestion that on the trial of the issue of partnership the defendant should be allowed to dispute the claim as well, for in Order XLVIII.a, r. 8, except in the last clause of that rule, which relates to a wholly different subject matter, they reproduced the provisions of the old rule, Order XLII., r. 10, in precisely identical terms. And I can well understand why they did so. A member of a partnership on becoming a partner takes upon himself the responsibility for everything that his partners may do in the conduct of the partnership, whether it be in the ordering of goods, or failing to defend an action, or admitting, however wrongly, the liability of the firm. In my opinion the Master and the judge in this case were right, and the appeal must be dismissed.

SCRUTTON L.J. A writ was issued against a firm of McVicar & Co. and served upon a Mr. Manasseh with notice that he was served as a partner in the firm. He desired to say, first, that he was not a partner, and secondly, that, if he was mistaken in that contention, the firm was not liable. The question is whether he can take up that position. What is to happen if a person alleged to be a partner, but who is not served with the writ, disputes the fact of his partnership? If the writ has been served on other members of the firm and judgment has been recovered against the firm, Order XLVIII.a, r. 8, provides that an issue may be directed to try the question whether the alleged partner is in fact a partner or not. But it seems clear that in that issue he cannot raise the question of the liability of the firm, for if he could you might have two separate judgments on the same cause of action, the one already obtained for a specified amount in the action against the firm, and the other, for possibly a reduced amount or for nothing at all, on the trial of the issue under r. 8. The only question that can be raised on the trial of that issue is whether the person against whom execution is

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sought was a partner at the material time or not. But if that is the position in the case of an alleged partner who was not served with the writ, can the fact that the alleged partner was served put him in any better position? The rules provide that a person who is served as a partner may do one of two things—he may appear as a partner and defend on behalf of the firm, or he may appear under protest saying that he is not a partner, in which case the service on him cannot be utilized for the purpose of getting a judgment against the firm. Such judgment can only be got by service on the firm in another way. To my mind that involves the proposition that a person who has been served as a partner cannot both deny the partnership and at the same time claim to defend the action on behalf of the firm. Whether the Rule Committee might not have allowed a defendant to enter a conditional appearance upon different terms, and to plead in the alternative that he is not a partner, and that even if he is the firm is not liable, it is not necessary to consider; they have not done it. In the case which led to the alteration of the rules in 1891, *Davies & Co.* v. *André & Co.* (1), Fry L.J. said there were two classes of persons who might be served as alleged partners, those who were in fact partners and must appear or let judgment go by default, and those who were not partners and who had consequently nothing to do with the matter. It was suggested, he added, that there was a third class, persons who were not sure whether they were partners or not and who wished therefore to have the opportunity of setting up the alternative defence, but he expressed disbelief in the existence of such persons, and said that at all events if they did exist he had no sympathy with them. Whether his proposition, that a person must know perfectly well whether he is a partner or not, is one which will meet with general acceptance may possibly be open to some little doubt, but it is his mental attitude towards that question which is reflected in the redrafting of the rules by the Rule Committee. In the present case the appellant desires to

(1) 24 Q. B. D, 598.

introduce a procedure for which I can find no trace of justification in the rules. Order XLVIII.a., r. 8, assumes that judgment has already been obtained against the firm by proper service, and then proceeds to point out who are the persons against whom it is to be enforced. The appellant desires to invert the procedure, and to suspend the obtaining of judgment against the firm until after it has been ascertained who are the persons against whom the judgment when obtained will be enforceable. There is nothing in the rules which allows of such a proceeding, which it appears to me is put forward in the interest of Fry L.J.'s third class of persons whose claim for consideration the Rule Committee distinctly rejected. I agree that the appeal must be dismissed.

ATKIN L.J. I agree. The only question in this case is whether a person who has been served as a partner and has entered an appearance under protest denying that he is a partner is entitled to an issue to try the question of his partnership and to have the proceedings in the action stayed until that issue has been finally determined. In my opinion there is no ground for suggesting that he has such a right. Under ordinary circumstances where a person enters a conditional appearance he does so subject to an implied term that he is to take steps to have it determined whether he has been rightly served or not, and that unless he takes such steps within a reasonable time his appearance is to stand as an unconditional appearance. But the case of appearance under protest of a person served as a partner does not fall within that general principle, for the effect of such an appearance is specially provided for by the rules, which say that a person so appearing is to take no further part in the action with which he is not concerned until after judgment has, upon a proper service of some other person, been recovered against the firm, and then, but not till then, he is entitled to have it determined whether he is a partner or not. To my mind there is no provision in the rules for determining any other issue. I quite agree with what

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Scrutton L.J. has said, that it would be quite impossible after judgment had been recovered against a firm to allow a person who was not a party to the action to question the liability of the firm in whole or in part, with the possible result that there might be two inconsistent judgments in respect of the same subject matter. A person who has entered an appearance under protest is not entitled to take proceedings as though he were a party who had appeared unconditionally. I say nothing as to what the position of the appellant would be if, though desiring to dispute his partnership, he had appeared unconditionally. It may be that an unconditional appearance would amount to such an admission of partnership as would preclude him from afterwards pleading in the alternative that he was not a partner, but it is not necessary to determine that point now. It is enough to say that having appeared under protest, under r. 7, he cannot ask the Court to order the issue which is sought.

Appeal dismissed.

Solicitors for the appellant: *Coward, Chance & Co.*
Solicitors for the respondents: *Johnson, Jecks & Colclough.*

J. F. C.

VERELST'S ADMINISTRATRIX *v.* MOTOR UNION INSURANCE COMPANY, LIMITED.

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March 3, 4.

Insurance—Accident—Motor Car—Death of Insured by Accident—Condition that Notice of Accident be given "as soon as possible"—Effect of Condition.

A policy of insurance, covering (inter alia) the death of the insured by accident, contained the following condition: "In case of any accident, injury, damage or loss . . . . the insured or the insured's representative for the time being shall give notice . . . . in writing to the head office of the company of such accident, injury, damage or loss as soon as possible after it has come to the knowledge of the insured or of the insured's representative for the time being."

During the currency of the policy—namely, on January 14, 1923—the insured was killed in a motor accident in India. Knowledge of her death reached her personal representative in England within a month, but the personal representative did not know of the existence of the policy of insurance till January, 1924. Notice was given to the insurance company as soon as possible thereafter. The insurance company repudiated liability on the ground that notice was not given "as soon as possible" within the meaning of the condition:—

Held, that, in considering whether notice was given "as soon as possible" within the meaning of the condition, all existing circumstances must be taken into account, including the available means of knowledge of the insured's personal representative of the existence of the policy and the identity of the insurance company; and that the arbitrator, to whom the dispute had been submitted, was entitled to find that notice had been given "as soon as possible."

AWARD in the form of a special case.

By a policy of insurance, dated May 6, 1922, issued by the respondent company, Miss Verelst, of Melmerby Hall, Ripon, was insured for twelve months in respect of injuries sustained while travelling by her own or other private motor car. The material provisions of the policy were as follows: "If the insured shall sustain in direct connection with the insured car or whilst . . . . travelling in any other private car any bodily injury . . . . (1.) in case such injury shall within three calendar months from the occurrence of the accident causing such injury directly cause the death of the insured the company shall pay to the insured's legal personal representatives the sum of 1000*l*. . . . . Provided always that the due observance . . . . of the conditions and qualifications indorsed on the

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back of this policy shall be a condition precedent to any liability of the company under this policy."

The following were the relevant conditions indorsed on the back of the policy :—

" (1.) In case of any accident, injury, damage or loss covered under this policy the insured or the insured's representative for the time being shall give notice together with the fullest information (including names and addresses of witnesses of accident) in writing to the head office of the company of such accident, injury, damage or loss as soon as possible after it has come to the knowledge of the insured or of the insured's representative for the time being."

" (3.) The company shall not be liable . . . . for any accident whilst the said motor car is . . . . used other than for the private pleasure purposes of the insured, nor . . . . outside the United Kingdom excepting for a period or periods not exceeding in all three months in any one year . . . . and then only in respect of accidents arising within the limits of the Continent of Europe and/or Algeria and Tunis, the insured to give written notice to the company of his intention to take the car abroad."

During the currency of the policy—namely, on January 14, 1923—Miss Verelst was killed in a motor accident at Meerut in India while being driven by her brother in his private motor car. The motor car insured under the policy was in England at the time.

Notice of the accident was first given by the claimant, Miss Verelst's administratrix, on January 8, 1924, and a claim under the policy was made by her on January 22, 1924. The respondents repudiated liability on the grounds that notice had not been given in compliance with condition 1, and that the policy was only operative in the United Kingdom.

The arbitrator found, in addition to the above facts, that :—

(1.) Knowledge of the death of the insured reached her mother and sister in England within a month of the accident.

(2.) The mother of the insured renounced administration of her estate, and letters of administration were granted to

her sister, the present claimant, on May 16, 1923. The claimant at all material times resided in London.

(3.) The claimant did not know that the deceased was insured with the defendants until the beginning of 1924. At the beginning of January, 1924, she was on a visit to Melmerby Hall, and while staying there went through some old papers of the deceased and accidentally discovered this policy.

(4.) No notice of the accident was given to the company before January, 1924, but notice was in fact given by the claimant as soon as possible after the terms of the policy had come to her knowledge.

On these facts the arbitrator awarded, subject to the opinion of the Court, that the claimant was entitled to recover from the company under the policy the sum of 1000*l.*

The question for the opinion of the Court was whether the award was right.

Schiller K.C. and *Gilbert Stone* for the company. By condition 1 indorsed on the policy the giving of written notice to the company, as soon as possible after the occurrence of an accident, is a condition precedent to the right to claim under the policy: *Gamble* v. *Accident Assurance Co.* (1); *Patton* v. *Employers' Liability Assurance Corpn.* (2); *Cassel* v. *Lancashire and Yorkshire Accident Insurance Co.* (3); *In re Williams & Thomas and Lancashire and Yorkshire Accident Insurance Co.* (4); and *Accident Insurance Co. of North America* v. *Young.* (5) That condition has not been complied with, for notice a year after the occurrence of the accident cannot be a notice "as soon as possible." The condition does not mean that the notice is to be given as soon as possible after the insured's representative becomes aware of the existence of the policy; it means as soon as possible after the fact of the accident comes to the representative's knowledge. If the claimant had shown proper diligence the policy

(1) (1870) Ir. R. 4 C. L. 204.
(2) (1887) 20 L. R. Ir. 93.
(3) (1885) 1 Times L. R. 495.
(4) (1902) 19 Times L. R. 82.
(5) (1892) 20 Can. S. C. R. 280.

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would have been discovered earlier. The phrase "as soon as possible" was discussed in *Hydraulic Engineering Co.* v. *McHaffie, Goslett & Co.* (1), and applying the views there expressed it is clear that the circumstance relied on here—namely, that the representative had no knowledge of the existence of the policy till the beginning of 1924—cannot be taken into account in her favour. Prompt notice is essential in view of questions of reinsurance.

[He also cited *Hick* v. *Raymond & Reid.* (2)]

Furthermore, condition 3 excludes liability for an accident occurring outside the United Kingdom or the specific geographical limits. The accident in question occurred in India, and therefore the policy has no application in those circumstances.

S. L. Porter for the claimant. With regard to condition 1 it is submitted that it has no application where the claim is by the insured's personal representative: *Globe Accident Insurance Co.* v. *Gerisch.* (3) Even assuming, however, that it does apply where death has occurred, and where consequently the claim is by her personal representative, the phrase "as soon as possible" means as soon as possible taking into consideration all the circumstances, and one of the circumstances in this case was that the administratrix was not aware till January, 1924, of the existence of the policy. The cases cited on behalf of the company are distinguishable, because in each of them a time was fixed by the policy within which notice of a claim had to be given.

[He cited *Hick* v. *Raymond & Reid* (4), *Hudson* v. *Hill* (5), and *Hulthen* v. *Stewart & Co.* (6)]

He was not called upon as to the construction of condition 3.

Schiller K.C. replied.

ROCHE J. [stated the facts and continued]: The company rely upon conditions 1 and 3 indorsed on the policy.

(1) (1878) 4 Q. B. D. 670.
(2) [1893] A. C. 22.
(3) (1896) 54 Am. St. Rep. 486.
(4) [1893] A. C. 22.
(5) (1874) 43 L. J. (C. P.) 273.
(6) [1903] A. C. 389.

Condition 3 raises a short point of construction, and it may be convenient to deal with it first. For the company it is said that by that condition they are not liable for anything happening outside the United Kingdom, except as specifically mentioned, and that as the accident in question happened in India, which is beyond the specified limits, the claim is not maintainable. I am satisfied that this condition cannot be relied upon by the company, for I hold that it relates only to accidents in connection with the use of the motor car insured. My reasons for so holding are that three times in condition 3, at the beginning, in the middle and at the end, the actual motor car is referred to and stipulations are made with regard to it. Further, I am unable to read grammatically the condition as Mr. Schiller for the company asks me to read it. He argues that the condition, omitting immaterial words, should read as follows: "The company shall not be liable for any accident arising whilst the motor car is used for other than private purposes of the insured nor arising, except as specifically provided, outside the United Kingdom." That would be a possible construction if regard were not paid to the words "for a period or periods not exceeding in all three months in any one year." An accident cannot arise "for" a period, although it may arise "during" a period. The proper and natural construction of the condition is to read it as providing that the company shall not be liable for any accident arising whilst the said motor car is used for other than private purposes of the insured, nor whilst it is used outside the United Kingdom except for a period or periods not exceeding three months. For these reasons I hold that the condition does not avail the company.

With regard to condition 1, Mr. Porter for the claimant submits that it has no reference to the case of death, and his reason for saying so is, mainly, that although there are references in the body of the policy to the legal representative of the insured, here the reference is to "the insured's representative for the time being," and he says, with some force, that that is a very inapt expression to

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describe the representative of a dead person who cannot have a representative for the time being. In support of that contention he cited *Globe Accident Insurance Co.* v. *Gerisch* (1) I will assume, however, that condition 1 does apply to the case, amongst others, of the death of the insured. The question then is, has the arbitrator found that notice was given "as soon as possible" within the meaning of the condition? The arbitrator, in my opinion, has so found, and I am unable to hold that he was wrong in so holding. For the company it is said first, that the words "as soon as possible" in reference to the giving of notice means as soon as any one in the abstract can give notice; and reliance is placed upon *Hydraulic Engineering Co.* v. *McHaffie, Goslett & Co.* (2) The words which most aptly summarise the view of the Court there and illustrate the contention of the company in this case are those used by Cotton L.J. (3): "By the words 'as soon as possible,' the defendants must be taken to have meant that they would make the 'gun' as quickly as it could be made in the largest establishment with the best appliances." The view suggested for the claimant is that the phrase means as soon as possible in the circumstances which prevail and apply to her, and in illustration of that view *Hick* v. *Raymond & Reid* (4) and *Hulthen* v. *Stewart & Co.* (5) were cited. The arbitrator adopted the claimant's construction of the clause, and I think he was right. It remains to deal with the second contention mainly relied upon by the company, that the arbitrator was wrong in law in relying upon the fact that notice was not given sooner because the administratrix was not aware of the policy. It is also said for the company that the claimant had not taken adequate and all possible steps to discover it more promptly. As soon as one holds, as I do, that all existing circumstances must be taken into account, it is impossible to exclude such circumstances as the available means of the administratrix's knowledge of the policy and of the identity of the insurance

(1) 54 Am. State Rep. 486.
(2) 4 Q. B. D. 670.
(3) 4 Ibid. 676.
(4) [1893] A. C. 22.
(5) [1903] A. C. 389.

company upon whom the claim was to be made. A number of cases were cited on behalf of the company in support of their view. Most of these are Irish, Canadian and American cases—not that they are any the worse for that; I assume that they were well decided—but almost all of them were cases in which a fixed time was mentioned for giving notice, or cases where an immediate notice had to be given. In those cases the claimants said that for various reasons it was impossible to give immediate notice, but the Court said that the alleged impossibility was no answer, because by taking various steps it would have been possible to give notice immediately. Those decisions seem to me to have no application where all that the tribunal has to decide is what was possible having regard to existing circumstances and assuming the exercise of a reasonable diligence on the part of the person under the obligation in question. Mr. Schiller relied upon certain expressions in *Hick* v. *Raymond & Reid* (1) as in his favour—such expressions as those used by Lord Herschell (2): "The respondents . . . . contend that the question is not what time would have been necessary or what time would have been reasonable under ordinary circumstances, but what time was reasonable under existing circumstances, assuming that, in so far as the existing circumstances were extraordinary, they were not due to any act or default on the part of the respondents." On the facts, as set out in this award, it is said for the company that there was default on the part of the claimant, inasmuch as she did not discover the policy with ordinary or proper diligence or despatch. There I think the company fails. There is no finding by the arbitrator of any default on the claimant's part, and I am quite unable to assume one. I do not think it can be said that in the somewhat exceptional circumstances of this case there was any default or even extraordinary delay. The lapse of time which occurred in no way affected the parties. In those circumstances I cannot say that there was no material upon which the arbitrator

(1) [1893] A. C. 22. (2) Ibid. 29.

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VERELST'S ADMINISTRATRIX v. MOTOR UNION INSURANCE CO.

could find as he did, nor can I say that he has gone wrong in law. I therefore answer the question in favour of the claimant, and the award stands.

Award upheld.

Solicitors for company: *Theodore Goddard & Co.*
Solicitors for claimant: *E. F. Turner & Sons.*

J. S. H.

1925
March 24, 25.

SMITH *v.* SMITH.

County Court—Jurisdiction—Action for Money Claim and for Declaration—Payments which may exceed 100*l.—Power to make Declaration—Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 89—*County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *s.* 56.

Where an action was brought in the county court to recover a money claim under an agreement, and also for a declaration as to future payments under the agreement:—

Held, that the county court judge had no power to make a declaration which might involve the payment of sums of money by the defendant in excess of the limit of 100*l.* prescribed by s. 56 of the County Courts Act, 1888.

Observations of Lord Sterndale M.R. in *Rex* v. *Cheshire County Court Judge* [1921] 2 K. B. 694 considered.

APPEAL from the Mayor's and City of London Court.

In 1881 the plaintiff was employed by Benjamin Smith & Co., a firm of corn merchants, as a salesman and buyer. In 1916 the defendant became the sole partner in the firm, and in December an interview took place between the plaintiff and the defendant at which it was suggested that the plaintiff should retire. The plaintiff alleged that it was agreed that the defendant should pay him a retiring pension of 240*l.* per annum during his (the plaintiff's) lifetime by equal monthly instalments of 20*l.* The defendant denied that he made such an agreement, and stated that the only agreement was that he should pay the plaintiff a voluntary allowance during the continuance of the business, and that, owing to heavy losses, he had been compelled to close it down.

The plaintiff retired from the business on August 17, 1917.

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The action was brought to recover the sum of 40*l.*, being two months' arrears of the alleged agreed pension due May 31, 1924. The plaintiff also claimed a declaration that the defendant was liable to pay to the plaintiff during the plaintiff's lifetime a pension at the rate of 240*l.* per annum by equal monthly instalments of 20*l.*

The county court judge held that the plaintiff was entitled to recover the 40*l.* as claimed, and after argument, made the declaration asked for.

The defendant appealed.

A. T. Miller K.C. and *Trapnell* for the defendant. To a money claim in the county court for a sum within the jurisdiction of the Court, there cannot be added a claim for a declaration which, if made, will involve a monetary liability exceeding that which is within the jurisdiction of the Court. The county court judge has read s. 89 of the Judicature Act, 1873 (1), in conjunction with s. 56 of the County Courts Act, 1888 (2), as entitling him to make the declaration asked for by the plaintiff. If that view is right, a declaration involving a pecuniary liability of thousands of pounds might be made where the actual money claim to which it is linked is only a few pounds. The true view of the sections is that where the money demand is within that limited by s. 56, s. 89 of the Judicature Act, 1873, empowers the judge to make ancillary orders for the purpose of giving effect to the claim. A declaration such as that made in this case can in no sense be considered as ancillary to a claim for 40*l.* The effect of the two sections was considered in *Rex* v. *Cheshire County Court*

(1) Judicature Act, 1873, s. 89: "Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity, and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional . . . . in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

(2) County Courts Act, 1888, s. 56: "All personal actions, where the debt, demand, or damage claimed is not more than [100*l.*], whether on balance of account or otherwise, may be commenced in the Court. . . . ."

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Judge. (1) There, it is true, there was no money claim at all, and on that ground it was decided that the county court judge had no jurisdiction to make a declaration, but the reasoning of the judgments supports the view now contended for.

Horton-Smith for the plaintiff. It is said on behalf of the defendant that the effect of making the declaration involves a result measured in money greatly exceeding the limit within which the county court has jurisdiction. That is not so. The only effect of the declaration is to enable the plaintiff to say that the defendant is estopped from denying that the agreement set up by the plaintiff was in fact made. But apart from any consideration as to the effect of the declaration, the county court had jurisdiction to make it. Whenever there is a claim which comes within s. 56 of the County Courts Act, 1888, the provisions of s. 89 of the Judicature Act, 1873, can be invoked: see *Ex parte Martin.* (2) There the plaintiff claimed damages for a nuisance caused by stenches issuing from a manufactory of the defendants, and also an injunction under s. 89 of the Judicature Act, 1873. Judgment was given for the plaintiff for 5*l.* damages and an injunction, and it was held by the Divisional Court and by the Court of Appeal that a county court has, in actions within its jurisdiction, power to grant an injunction against a nuisance on the ground that an injunction was not a new cause of action, but a remedy. In *Rex* v. *Cheshire County Court Judge* (3) the Court of Appeal expressed the opinion that a declaration was merely "ancillary" relief. Lord Sterndale M.R. said that as soon as it was ascertained that the main relief claimed —namely, a sum of money—could not be recovered because it exceeded the limit, the jurisdiction of the county court ceased, and the Court could not give "the ancillary relief either of injunction or declaration." And Scrutton L.J. said: "The principle is that there must be a money claim. If there is no valid or justifiable money claim the ancillary remedies, such as injunction and declaration, cannot be

(1) [1921] 2 K. B. 694.
(2) (1879) 4 Q. B. D. 212, affirmed sub nom. *Martin* v. *Bannister* 4 Q. B. D. 491.
(3) [1921] 2 K. B. 694, 704, 708.

granted." Again in *Davey* v. *Robinson* (1) Lord Sterndale M.R. said that an injunction was "ancillary to the claim for damages," and Younger L.J. used similar language. The true meaning of s. 89 of the Act of 1873 is that if an action is within the jurisdiction of the county court, any consequential relief may be given by that Court.

[He also referred to *Simpson* v. *Crowle*. (2)]

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BANKES L.J. This is an appeal which raises two distinct questions. One of them is no doubt an important question of jurisdiction. [The learned judge stated the facts and continued:] The objection to the jurisdiction is that the county court judge had no jurisdiction to entertain the claim for a declaration, and that the judgment, in so far as it granted a declaration, is bad and should be set aside. Speaking for myself, I think the question is very plain, not only upon the statutes, but also upon the authorities bearing upon the question. So far as the statutes are concerned, there are two sections which have to be considered. The first is s. 56 of the County Courts Act, 1888, which defines the jurisdiction of the county court in personal actions, and the second is s. 89 of the Judicature Act, 1873. [The learned judge read the latter section and continued:] In my opinion the governing words are those which indicate that the operation of the section is directed to causes of action within the jurisdiction of the inferior court for the time being; and that the relief which the section contemplates may be given is not relief extending the jurisdiction of the inferior court, but to complete and make more effective any jurisdiction which it may otherwise have. I should have been quite content to decide this point on the words of the section, which seem to me to indicate quite clearly that it is not a section extending the jurisdiction, but is a section completing the jurisdiction.

Two cases have been cited by Mr. Horton-Smith, one of which he contends is strongly in his favour. That is *Ex parte Martin*. (3) I cannot take the same view of that case. There

(1) [1923] 1 K. B. 563, 570. (2) [1921] 3 K. B. 243.
(3) 4 Q. B. D. 212, 491.

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the plaintiff claimed 5*l.* damages in respect of a nuisance, and also claimed an injunction. He got judgment for the 5*l.* damages and he asked for an injunction. The object of the injunction there was to make effective the judgment which he had recovered for the 5*l.* The Court was saying, in effect: "We will give you 5*l.* damages and will take care you shall never have occasion to come for another 5*l.*, because we have jurisdiction to prevent a man from doing a thing which we hold he ought not to have done and for which he has to pay 5*l.*" I will refer to certain passages from the judgments. In the Divisional Court Pollock B. said: "A plaintiff, it was urged, may claim only a small sum of 5*l.* or 10*l.* for damages, but the injunction may have an effect on the value of the defendant's property to an extent far beyond that sum. The plaintiff's answer is that he has nothing to do with the effect it may have on the defendant's property; his damages are limited to the sum he claims." There the plaintiff obtained judgment for 5*l.* damages. He said in effect: "I never want to come again for another 5*l.*, so please grant an injunction which will make your judgment for 5*l.* as effective as possible." In the Court of Appeal Bramwell L.J. said: "I am not sure that the county court would have jurisdiction if the only cause of action were apprehended damage. But if there has been actual damage, there is but one cause of action for which there are two remedies; damages and an injunction." Brett L.J. said: "As soon as it is admitted that an injunction is not a cause of action but a remedy, the power of the county court to grant an injunction becomes clear." Cotton L.J. makes the point I wish to take abundantly clear when he says: "That the granting of an injunction was merely an additional remedy, and not a new cause of action, is shewn by the fact that the Court of Chancery would give no damages, but only granted an injunction." With regard to the other case cited, *Rex* v. *Cheshire County Court Judge* (1), I quite agree that what was there said by some members of the Court were obiter dicta, because the point there under discussion was not the same as the point in the present case. It is necessary

(1) [1921] 2 K. B. 694, 701.

to refer to the facts of that case to account for the introduction of the expression "ancillary." The action was brought for a declaration merely, without any other claim. What the Court had to decide was whether the county court had jurisdiction to deal with any such claim. In discussing that matter the Master of the Rolls says more than once that the right which the county court has under s. 89 of the Judicature Act is ancillary, that is to say, supplemental. It is an additional remedy, the making more effective a remedy for the one cause of action. Undoubtedly Lord Sterndale M.R. did express his opinion very clearly as to the argument that was addressed to the Court in reference to the construction sought to be placed upon s. 89 of the Judicature Act. He said: "It entirely ignores the limited jurisdiction of the county court. It is not at all difficult to suppose cases in which declarations of right might be asked for in this way, which might actually involve many thousands of pounds in money; and if such a case as that could be got into the county court simply by leaving out the technical claim for damages, the limit of the county court jurisdiction might be entirely abolished whenever there was a right to ask for a declaration. I think that is wrong and cannot be done." It may be true that that is obiter, but it is an expression of opinion by a very learned judge, and is entirely in accordance with the decision in *Ex parte Martin*. (1)

Applying those principles and those decisions to this case, it seems to me perfectly manifest that there are in this claim two causes of action. The one is a cause of action to recover two months' arrears of pension due on May 31, 1924. In regard to that it was only necessary to prove an agreement which would cover that period. But the plaintiff goes on to say: "I also want a declaration that not only are you liable in respect of that period, but you are also liable to pay this amount monthly for the whole of my life." It seems difficult to follow the suggestion that that is not a separate and different cause of action. It is not an additional relief or remedy, or making more effective the plaintiff's remedy

(1) 4 Q. B. D. 212, 215, 491, 492, 493.

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in respect of the cause of action of a liability covering the two months up to May 31, 1924. It is asking for something essentially different, and in respect of which the cause of action is quite different. It may be that the same agreement will prove both, but that does not prevent the two claims from being separate causes of action.

For these reasons I think that the appeal must be allowed in so far as it asks for the setting aside of the declaration contained in the judgment.

[The learned judge further held that the county court judge was justified in coming to the conclusion, upon the facts as he found them, that there was an agreement by the defendant to pay the plaintiff 240*l.* per annum for life, and that the judgment for 40*l.* must stand.]

SCRUTTON L.J. [after holding that there was ample evidence on which the county court judge could find an agreement by the defendant to pay the plaintiff a retiring allowance of 240*l.* a year payable monthly, and that the plaintiff was entitled to judgment for 40*l.*, continued:] Now comes a much larger question. The county court judge not only dealt with the claim of 20*l.* a month for two months, but went on to make a declaration that the defendant is liable to pay to the plaintiff a pension at the rate of 240*l.* per annum by monthly instalments of 20*l.*, that is to say, he finds a liability of 240*l.* a year which may exist for some years, and which may therefore easily come to over 1000*l.* Had he jurisdiction to do that? There is no doubt that in the High Court it could be done without making any money claim; that is because of the special High Court rules. A county court judge is a judge of limited jurisdiction; he cannot deal with money claims of over 100*l.*; and how, as he cannot deal with money claims of over 100*l.*, he can hold that a defendant is liable to pay 240*l.* a year for the lifetime of the plaintiff, I do not understand. It seems to me clear that the judge exceeded his jurisdiction when he made a declaration that that was a liability of the defendant. I am not very much concerned to consider whether the expressions

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of Lord Sterndale M.R. in the *Cheshire* case (1) were obiter dicta or not. Lord Sterndale thought they were not, I think, because he gave two reasons for his decision. One was that there being no money claim, nothing could be done in respect of it; the other was a matter which he expressed in the first part of his judgment. [The Lord Justice read the passage set out above in the judgment of Bankes L.J. and continued:] Again he said: "A claim for such a declaration as this cannot be brought in the county court without anything to limit the money result of it, so as to disregard the limit of the jurisdiction of the county court altogether. As I have pointed out it would be possible by simply omitting a claim for damages to bring into the county court an action for a declaration which might involve a money result of many thousands of pounds. I do not think that can be done." My view is that when the learned county court judge made this declaration that the defendant is liable to pay during the plaintiff's lifetime an annual pension at the rate of 240*l.* per annum, he was involving the payment of money which was beyond the limit of the county court jurisdiction of 100*l.*, and whether Lord Sterndale's reasons in the *Cheshire* case (1) were obiter or not, I entirely agree with them as applied to this case. They seem to me to show that the county court judge exceeded his jurisdiction in making this declaration, and I therefore think that it should be struck out of the judgment. The judge has included in his judgment a declaration which exceeds the jurisdiction which he could exercise under the Act.

Appeal allowed in part.

Solicitors for defendant: *Keene, Marsland, Bryden & Besant.*
Solicitors for plaintiff: *Ravenscroft, Woodward & Co.*

(1) [1921] 2 K. B. 694, 703.

F. C.

C. A.
1925
April 21.

[IN THE COURT OF APPEAL.]

WEBER *v.* BIRKETT.

Practice—Claim for two Causes of Action—Payment by Defendant into Court in respect of each Cause separately—Verdict of Jury for one Sum in Respect of both Causes—Effect of Order XXII., *r.* 2.

The plaintiff sued the defendant for a slander and for a libel. The defendant pleaded an apology, and paid into Court two sums of 105*l.* each, one in respect of the slander and the other in respect of the libel. The jury returned a verdict for a lump sum of 200*l.* to cover both causes of action:—

Held, that that was no verdict, and that no judgment could be entered upon it for either party.

By Order XXII., r. 2, "Payment into Court shall be signified in the defence, and the claim or cause of action in satisfaction of which such payment is made shall be specified therein."

Semble that a plea of payment into Court of one sum in respect of two or more separate causes of action is a bad plea under the above rule, and not merely a ground for an application by the plaintiff for particulars.

Dicta in *Benning* v. *Ilford Gas Co.* [1907] 2 K. B. 290 to the contrary questioned.

Order of Lord Hewart C.J. affirmed.

APPEAL from an order of Lord Hewart C.J. after a trial with a jury reported supra (1). The plaintiff sued the defendant for damages for (1.) slander uttered in a speech made by him at a public meeting, and (2.) libel contained in a report of that speech published at his instigation in a local newspaper. By his defence the defendant pleaded an apology published in a newspaper after the commencement of the action, and paid into court 105*l.* in satisfaction of both the slander and the libel. On being required by the plaintiff to specify how much of that sum was paid in respect of the slander, and how much in respect of the libel, he amended his defence by paying in another sum of 105*l.* and allocating 105*l.* to each cause of action. At the trial the jury were directed by the Chief Justice to find separately the amounts of the damages to which the plaintiff was entitled for the slander and the libel respectively. The jury, however, found

(1) [1925] 1 K. B. 720.

a single sum of 200*l.*, and said that they could not discriminate. The Chief Justice asked them whether by that statement they meant that in their opinion the sum of 200*l.* ought to be equally divided—100*l.* as damages in respect of the slander and 100*l.* as damages in respect of the libel. They answered that that was not what they meant; what they meant was that they could not discriminate and could not assess a separate sum in respect of each cause of action. The jury were then discharged. Each party asked for judgment. The Chief Justice held that as the causes of action were distinct the verdict was bad, and he declined to enter judgment for either party. After the jury were discharged the defendant asked for leave to amend his pleading by alleging that the money was paid in generally in satisfaction of both causes of action, but the application was refused.

The defendant appealed.

Sir Henry Maddocks K.C. and *Hon. S. O. Henn Collins* for the appellant. Though possibly in form there may have been two separate causes of action, in substance there was only one. The distinction between libel and slander is purely technical where, as here, the defamatory words used in both and the occasions of their publication are precisely the same. The real issue between the parties is: what damage did the plaintiff's reputation suffer? The jury have found that it was 200*l.* But even if in substance there were two causes of action, the terms of Order XXII., r. 2, do not preclude a defendant from paying into Court one sum to cover both causes, and if a defendant may justify such a payment into Court, a verdict by a jury for one sum in respect of two causes of action must equally be good. That a plea of payment into Court of one sum in satisfaction of several causes of action is not a bad plea appears from *Benning* v. *Ilford Gas Co.* (1), where a number of mortgagees joined in bringing an action for injury caused to their respective houses, and the defendants having paid into Court a lump sum in satisfaction of the whole of the plaintiffs' claims, the official

(1) [1907] 2 K. B. 290, 294.

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referee to whom the matter was referred found that the sum paid in was more than sufficient and gave the defendants their costs. The plaintiffs objected that the referee had no jurisdiction to do so, but the Court supported his order. Darling J. said: "I think the remarks of Bramwell L.J. in *Paraire* v. *Loibl* (1), as to the injustice which it might work to a defendant, if he was in all cases compelled to specify how much he had paid into Court in respect of each item of claim, apply in principle to the present case. . . . . The defendants have paid a lump sum into Court. . . . . The question is: Was that a good payment into Court? The official referee has treated it as a good payment, and has made his order as to costs upon that basis. I think the true view is that this is a good payment prima facie." And Phillimore J. said: "I think the case of *Paraire* v. *Loibl* (1), decided on a rule in the same terms as the present Order XXII., r. 2, was rightly decided, and that a defendant sued by one plaintiff in respect of several causes of action may properly pay into Court one sum admitting liability for many causes of action. He would no doubt in a proper case be ordered to give particulars, while in other cases such an order might be refused."

Charles K.C. and *Hinde* for the respondent were not called upon.

BANKES L.J. In my view the course taken by the Chief Justice was quite right, and under the circumstances was the only one that it was possible for him to take. The action was brought to recover damages for a slander, and also for a libel, two quite distinct causes of action. I think it only leads to confusion to call attention to the fact that the nature of the defamation was the same in both. That does not make them any the less distinct causes of action. The defendant, in the first instance, paid into Court one sum of 105*l.* as sufficient to satisfy both claims. It is in my opinion well established by the authorities that that was not a good plea. In *Mackay* v. *Manchester Press Co.* (2) the plaintiff

(1) (1880) 49 L. J. (C. P.) 481. (2) (1889) 6 Times L. R. 16.

brought an action for libel setting out the libel complained of and laying an innuendo. The defendants in their defence accepted a part of the innuendo as correctly representing the meaning of the words used, but denied the other part, and they paid into Court 10*l.* A. L. Smith J. at chambers ordered the defendants to state in their defence to which part of the statement of claim the payment into Court was intended to apply, and that order Huddleston B. and Stephen J. affirmed upon appeal. In *James Tucker Steamship Co.* v. *Lamport & Holt* (1) the same view was taken. There the action was by shipowners against charterers for (1.) balance of freight; (2.) a sum alleged to have been overpaid to the defendants' stevedores; and (3.) demurrage. The defendants paid into Court a sum of 250*l.* in satisfaction of the whole of the plaintiffs' claim, together with a denial of liability. The plaintiffs applied for an order for particulars of the payment into Court, and Walton J. made the order asked. On appeal Cozens Hardy L.J. went further, and held that not only were the plaintiffs entitled to particulars, but that the plea of payment into Court was a bad plea. He said: "This was not a case merely of separate items of damage, but a case of separate and distinct causes of action. The rules by their language required that a defendant should state in respect of what cause of action he paid money into Court. A defendant could not pay money into Court and say it was in respect of several causes of action." The only authority to the contrary to which we have been referred is a dictum of Darling J. in *Benning* v. *Ilford Gas Co.* (2) There the defendants were alleged to have wrongfully obstructed a stream and thereby flooded a number of houses which were mortgaged to different persons. The several mortgagees joined in bringing one action for the damage, and claimed in the aggregate 1115*l.* The defendant brought into Court with a denial of liability 100*l.* in satisfaction of the whole damage. The official referee found that that sum was enough, and, dealing with the case upon the footing that the payment into Court was a good payment, gave judgment for the

(1) (1906) 23 Times L. R. 10, 11. (2) [1907] 2 K. B. 290, 294.

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defendants with costs. There was an appeal from so much of the referee's decision as dealt with the costs, and that appeal was dismissed. It may be that the Court were right in dismissing the appeal, having regard to the fact that the plaintiffs allowed the case to go to trial without taking any objection to the payment into Court, but Darling J. said: "I think the true view is that this is a good payment prima facie," and went on to add that the plaintiffs, if they were embarrassed by the payment, had the remedy in their own hands in the shape of an application for particulars. I think that statement of the learned judge is not consistent with the authorities to which I have referred, and is not good law.

Then payment into Court of 105*l.* having been made in the present case in respect of both causes of action, the defendants' solicitor wrote to the defendant asking him to appropriate the payment. In reply the defendant amended his defence by paying into Court a further sum of 105*l.*, and appropriating 105*l.* to each cause of action, and it was upon that amended pleading that the case went to trial. Under those circumstances it was necessary for the jury to give a separate verdict upon each issue. Instead of doing so they found a verdict for 200*l.*, and when asked to appropriate it, and say how much they gave in respect of the slander and how much in respect of the libel, insisted that they were unable to do so. In my opinion that was no verdict at all, and the Chief Justice was quite right in treating the trial as a mistrial, and refusing to enter judgment for either party. It is said that the judge should have allowed the defendant to amend his plea, and say that the whole of the money was paid in generally in respect of both causes of action, so as to make it fit the verdict. But there are two objections to that: In the first place the plea when so amended would for the reasons I have given be a bad plea; and, secondly, the defendant, having already amended his defence once, could not ask to be allowed to amend again and revert to the form of payment which, on his attention being called to it, he had deliberately abandoned. The appeal must be dismissed.

SCRUTTON L.J. In this case I think the jury failed to find a verdict on the different issues on which it was necessary for them to find, and therefore the verdict was no verdict. It seems to me that it was quite impossible to make the amendment that was asked for.

ATKIN L.J. I agree. When once the jury were discharged without coming to a verdict on the issues joined between the parties, it seemed to me that the learned judge could not have acted otherwise than as he did. I agree that the proposed amendment could not possibly have been made. With regard to *Benning* v. *Ilford Gas Co.* (1) I may say that in my opinion that case must be regarded as of very doubtful authority in view of the language of the rule and the earlier decisions upon it.

Appeal dismissed.

Solicitors for the appellant: *Cunliffe, Blake & Mossman, for Tolhursts & Cozens, Southend-on-Sea.*

Solicitors for the respondent: *Bentley & Jenkins, for Thurlow Baker, Southend-on-Sea.*

(1) [1907] 2 K. B. 290.

J. F. C.

1925
Feb. 10.

THE KING *v.* THE EVENING NEWS.

Ex parte HOBBS.

Contempt of Court—Charge to Grand Jury—Public Proceeding—Judicial Proceeding—Publication—Report in Newspaper—Privilege—Fair and accurate Report.

A charge to the grand jury delivered by the Recorder of London in a place to which the public and reporters are admitted is a public judicial proceeding in a Court of justice of which newspapers have a right to publish a fair and accurate report.

Lewis v. *Levy* (1858) E. B. & E. 537, 557–561 and *Reg.* v. *Gray* (1865) 10 Cox, C. C. 184 (Ir.) principle applied.

Consideration of the question whether or not a report published in a newspaper of a charge by the Recorder of London to the grand jury was a fair and accurate report and should be regarded as privileged.

ORDER NISI for a writ of attachment for alleged contempt of Court.

The applicant, William Cooper Hobbs, was committed for trial by the chief magistrate of the metropolis at Bow Street Police Court to the Central Criminal Court on charges of alleged conspiracy to steal, conspiracy to defraud, and receiving stolen property contrary to the Larceny Act, 1916, s. 35, sub-s. 4. On February 3, 1925, the Recorder of London delivered a charge to the grand jury in respect of the matter. Reporters and members of the public were allowed to be present. An official shorthand writer and also a reporter of the Press Association were present, and each of them took a shorthand note of the charge, the two notes being substantially identical.

The charge of the Recorder, as set out in the official shorthand note, began by stating, in effect, that Hobbs, who was an accountant, was charged with conspiring with other persons to steal the property of an oriental Rajah named Sir Hari Singh, with conspiracy to defraud him of his property, and with receiving two cheques for 150,000*l.* each; that "according to the evidence" a conspiracy was entered into by Hobbs and two other persons named Newton and Arthur; that the alleged conspiracy was that a Mrs. Robinson

should be discovered in a compromising position with the Rajah, and that money should be obtained from him by threatening him with divorce proceedings; that Mrs. Robinson took rooms at a hotel in Paris; that on December 25, 1919, Newton, who assumed the role of her husband, went to the hotel and entered a bedroom in which Mrs. Robinson was with the Rajah, and pretended to be very angry; that Arthur told Newton that he had received instructions from the Rajah to arrange matters; that, on the return of Arthur, Newton, and Mrs. Robinson to London, Newton saw Hobbs and told him what had occurred; that a few days afterwards a meeting took place between Newton, Arthur and Hobbs, when Hobbs produced two cheques for 150,000*l.* each, and said that a settlement had been arranged under which one cheque was to be cashed at once, and that funds would have to be sent from India to meet the other. The official note of the Recorder's charge then continued as follows: "150,000*l.* or 300,000*l.* may appear to you a large sum for assailing the virtue of Mrs. Robinson. Probably you think if it were put in farthings, it would probably more represent the value of the virtue. But that is nothing to do with us. The point is you see the Rajah for reasons which we need not enter into, they may be political or diplomatic reasons we need not trouble about, was very anxious to avoid publicity. These clever scoundrels knew that that was so, and played upon that, and thereby got this enormous amount of money." The official note then stated that it was eventually arranged that Mrs. Robinson and an acquaintance of hers should have 20,000*l.* between them, which the jury might think rather a small sum considering the important part she was alleged to have played, and that the balance of the 150,000*l.*—namely, 130,000*l.*—should be divided between Newton, Arthur and Hobbs; that the cheque for 150,000*l.* was in favour of Hobbs's firm, and was indorsed by that firm to the order of C. Robinson, the husband, whose indorsement it bore; that Hobbs paid the cheque into the Midland Bank, Kingsway, and opened a current account at that bank in the name of Charles Robinson, whose signature was to operate

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the account; that on January 6, 1920, Hobbs cashed a cheque at the bank for 130,000*l.* signed "C. Robinson"; that it was said that on January 16, 1920, there was a meeting of Hobbs, Arthur, Newton and the Robinsons when Hobbs produced 21,000*l.* in notes, which was divided between the five in certain proportions, nothing being said about the balance of the 150,000*l.* The official note then continued: "Then when Mr. Robinson found that he had himself been treated in this way he brought an action which you may or may not have heard of; if you have heard of it you must forget it. You must only attend to what is in evidence, but there was an action against the Midland Bank, an impudent action, for the balance of the cheque on the ground that the whole of the money was due to him. He, the outraged husband, was to have 150,000*l.* for the loss of his wife's society. That action was, as it deserved to be, unsuccessful, but owing to the revelations made at the trial certain warrants were issued against some of the alleged conspirators, and the result was that Hobbs was arrested. . . . . When arrested and charged he said the charge was absurd and that he was not guilty. The evidence in the case is of an extraordinary character and there can be no doubt, I should say—it is for you to judge—that Hobbs was a party to a gigantic fraud, as monumental and perhaps as impudent a fraud as has ever been perpetrated in the course of our law. If you think there is a prima facie case you will find a bill against him. . . . ." The note taken by the reporter of the Press Association was received by various newspapers, one of which was the Evening News.

On the evening of the same day, February 3, 1925, the Evening News published an article, purporting to be a report of the Recorder's charge, in the following terms:

RECORDER AND MRS. ROBINSON.

OLD BAILEY COMMENT ON PENCE AND VIRTUE.

HOBBS'S PART.

"NO DOUBT PARTY TO A MONUMENTAL FRAUD."

"There can be no doubt, I should say, that Hobbs was a

party to a gigantic fraud. It was as monumental and as impudent a fraud as, perhaps, has ever been perpetrated in the course of our criminal history."

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These words were used by the Recorder, Sir Ernest Wild K.C., in his charge to the grand jury at the Old Bailey to-day.

He was referring to William Cooper Hobbs, aged 60, accountant, who was indicted for conspiring to defraud Sir Hari Singh, and for conspiring to steal valuable securities and moneys from him by means of menaces, and also receiving two bankers' cheques for 150,000*l.* knowing them to have been stolen.

MRS. ROBINSON.

The Recorder outlined the allegations of conspiracy against Hobbs in regard to the Paris incident when Mrs. Robinson and Sir Hari Singh were found in an hotel.

"The 150,000*l.*, or 300,000*l.*," he said, "may appear to you to have been a large sum for selling the virtue of Mrs. Robinson.

"Probably if it were put into farthings it would more approximately represent the value of the virtue. But that is nothing to do with us.

"The point is that the Rajah, for reasons into which we need not enter, was very anxious to avoid publicity. These clever scoundrels knew that this was so, and played upon it, and thereby got this enormous amount of money."

"IMPUDENT ACTION."

Sir Ernest went on to say that Mr. Robinson was led to believe that 30,000*l.* or thereabouts was all that had been paid.

"When Mr. Robinson found that he had been treated in this way he brought an action against the Midland Bank—an impudent action—for the balance of the cheque, on the ground that the whole of the money was due to him; he, the outraged husband, was to have 150,000*l.* for the loss of his wife's society.

"That action was, as it deserved to be, unsuccessful. . . . ."

On February 6, 1925, the applicant obtained an order nisi

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requiring that the editor and publishers of the said newspaper should show cause why a writ or writs of attachment should not issue against them for their alleged contempt in writing or publishing or causing to be written or published the said report on the ground that it was calculated to prejudice the fair trial of the applicant on the above mentioned charges.

Mr. F. L. Fitzhugh, the editor of the Evening News, made an affidavit in which he stated that at the material times he was absent from the office, that on his return he made enquiries and was satisfied that the report of the Recorder's charge was dealt with in the usual manner, and that if he had been at the office he would have dealt with the report in the same way.

Mr. A. L. Cranfield, the chief sub-editor of the Evening News, made an affidavit stating that the Press Association report of the charge came before him in the usual course of his duty and was handed by him to a sub-editor to be sub-edited, that the report as sub-edited was passed by him for publication, that he had no reason to believe it was other than a fair and accurate report of the charge, and that other evening newspapers had dealt with the charge in a similar manner.

Mr. W. McCartney, journalist, made an affidavit stating that on the date in question he was acting as editor in the absence of the editor, that he did not himself see the report of the Recorder's charge, which was received from the Press Association in the ordinary course of business, but that a page proof containing a report was brought to him as acting editor and he passed it for publication, that he had no reason to doubt that it was a fair and accurate report of the charge, that he had since read the Press Association report and the official shorthand note and submitted that the Evening News report substantially agreed with these reports, that the Press Association was always regarded by the leading newspapers as a trustworthy and accurate source of information, and that he submitted that the report in question did not travel beyond the limits of a fair and accurate report of a judicial proceeding.

Jowitt K.C. and *Giveen* showed cause. The order nisi for an attachment should be discharged.

First, the Evening News was entitled to publish a fair and accurate report of the learned Recorder's charge to the grand jury. It is now well established that a newspaper has a right to publish a true account of the proceedings in a Court of justice, provided they are of a judicial character and conducted in public, however injurious the published account may be to any individual: *Curry* v. *Walter* (1); *Rex* v. *Wright* (2); *Lewis* v. *Levy* (3); and *Reg.* v. *Gray.* (4) Proceedings before magistrates even where ex parte are judicial and public proceedings in a Court of justice, of which, therefore, a fair and accurate report is privileged: *Ryalls* v. *Leader* (5); *Usill* v. *Hales* (6); and *Kimber* v. *Press Association* (7); and see *Macdougall* v. *Knight.* (8) The charge delivered by a judge to the grand jury in a place which is open to the public is equally a public and judicial proceeding in a Court of justice, of which a fair and bona fide report may properly be published. It would not be reasonable to expect that a reporter should be either the custos morum or the censor morum of judges: *Macdougall* v. *Knight* (8); and *Kimber* v. *Press Association.* (7) In order that the report of a judicial proceeding should be privileged, it is not necessary that it should summarize the evidence: *Macdougall* v. *Knight.* (8)

Secondly, the report in question is a fair and accurate report of the Recorder's charge. Though it may omit once or twice such words as "it is said," it makes the equivalent statement that the Recorder "outlined the allegations," thus showing that it is dealing only with the assertions of witnesses. The report in question is not prevented from being fair and accurate by the headline "No doubt party to a monumental fraud," because that headline merely repeats the statement made by the Recorder in these very terms. The omission of the words "I should say" and "it is for

(1) (1796) 1 Bos. & P. 525.
(2) (1799) 8 T. R. 293, 298.
(3) E. B. & E. 537, 557, 561.
(4) 10 Cox, C. C. 184 (Ir.).
(5) (1866) L. R. 1 Ex. 296.
(6) (1878) 3 C. P. D. 319.
(7) [1893] 1 Q. B. 65.
(8) (1890) 25 Q. B. D. 1.

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you to judge" used by the Recorder in connection with that statement is immaterial. That headline also correctly represents the Recorder's view as expressed in other passages of the charge, as where he says: "There can be no doubt, I should say, that Hobbs was a party to a gigantic fraud," or where he says: "the Rajah . . . . was very anxious to avoid publicity. These clever scoundrels knew that that was so." The editor and publishers of the newspaper were entitled to publish the charge and any passage or statement therein. It would not be intolerable to require that they should supervise or recast the language of the Recorder. If the charge had been set out at length in the newspaper it would have been more likely to prejudice the trial of the applicant than the shortened report actually given. According to the principle laid down in the authorities this report should be held privileged, inasmuch as its beneficial effect in giving publicity to the charge outweighs any possible injury which it may do to this individual applicant.

St. John Hutchinson (*I. G. Kelly* with him), in support of the order nisi. The order nisi for a writ of attachment should be made absolute.

First, the Evening News had no right to publish any report of the Recorder's charge to the grand jury, and the report in question, even if fair and accurate, is a contempt of Court. In order that a fair and accurate report of proceedings in a Court of law may be privileged, the proceedings must be judicial and public. The charge delivered by a judge to the grand jury and the finding of the jury thereon are neither judicial nor public proceedings. They are not judicial proceedings. The grand jury is merely a jury of presentment, its function being "to make presentments to judicial bodies or personages mainly of accusation against persons against whom criminal proceedings are pending": see Halsbury's Laws of England, vol. xviii., p. 241, tit. "Juries." Unlike other juries, the grand jury is not a jury of inquest. (1) Its office is very different from that of the petty jury. It hears

(1) The opening words of the form of oath in common use are: "You as foreman of this grand inquest."—F. P.

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no evidence nor arguments of counsel, and it arrives at no decision as to the guilt or innocence of the prisoner, but presents an accusation or true bill for investigation. Neither is the charge delivered to the grand jury a public proceeding. In *Reg.* v. *Bullard* (1) Byles J. said that the grand jury were a secret tribunal. That the proceedings before the grand jury are not public proceedings appears further from the words of the oath administered to and taken by them: "The King's counsel, your own, and your fellows' you shall well observe and keep secret. . . . ." The "King's counsel" there mentioned can only be the charge delivered to the jurors by the judge, and they swear that they will keep that secret.

[LORD HEWART C.J. The charge to the jurors is one thing; their subsequent discussion of it is another thing.]

If newspapers have not hitherto had the right of publishing a charge to the grand jury, that right ought not now to be conferred upon them. The general privilege which the press enjoys of publishing reports of legal proceedings ought not to be further extended. Many modern journalists mistake liberty for licence, and publish matter which ought not to be published under the pretence that public policy requires it. They produce highly sensational reports by selecting for publication the most emotional parts of the proceedings and by making emotional headlines, and reports of that kind in the earlier stage of the proceedings may obviously tend to prevent a fair trial. One of the reasons why the scope of reporting proceedings in Courts of law was enlarged was that needless scandal would be thereby avoided; but if newspapers are allowed to publish all that is said during proceedings preliminary to a trial, such as a charge to the grand jury, the result will in many cases be more likely to increase than to diminish scandal. In the early part of last century it was held that a newspaper had no right to publish the ex parte examinations taken before a magistrate before committing a prisoner for trial, inasmuch as to do so would tend to prejudice the minds of the jury who were to try him, and so disturb the course of justice: *Rex* v. *Fisher* (2);

(1) (1872) 12 Cox, C. C. 353. (2) (1811) 2 Camp. 563.

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and at the present day newspapers should on the same principle be prevented from publishing a charge to the grand jury. A newspaper ought not, before a case comes on for trial, to publish the private proceedings, such as an affidavit charging fraud: per Scrutton J. in *Rex* v. *Astor and Others. Ex parte Isaacs; Rex* v. *Madge. Ex parte Same.* (1)

Secondly, the report now in question is not a fair and accurate report of the Recorder's charge. The charge as a whole, to whatever objections it may be open, at all events purports to be, and for the most part is, a statement of the evidence that had previously been given. Towards the beginning of the charge it is stated that "according to the evidence" a conspiracy was entered into, and in the course of the charge the words "it is alleged" or "it is said" occur more than once. The report in question omits these words and purports to be stating not mere evidence but matters of fact. The charge contains more than once the very important words "it is for you to judge," which show that the Recorder was not expressing his own opinion, but leaving it to the grand jury to form their opinion. This report omits these words, and its omission of them constitutes a most serious defect rendering it unfair and inaccurate, and almost certain to prejudice the trial of the applicant. The charge stated about the applicant that "When arrested and charged he said the charge was absurd, and that he was not guilty," but this report omits to mention that denial of liability. Further, the report improperly takes from its context in the charge the highly sensational observation that the applicant was "No doubt a party to a monumental fraud," and puts it into a heading in large type, thus not only giving it undue prominence and causing it to be much more widely read, but prejudging the case of the applicant and asserting in terms that he is guilty. In considering whether the report is entitled to privilege, it is to be remembered that the test is not whether the publication will in fact interfere with the course of justice, but whether it tends to do so: *In re Pall Mall Gazette.* (2)

(1) (1913) 30 Times L. R. 10.

(2) (1894) 11 Times L. R. 122.

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LORD HEWART C.J. This is an order nisi obtained at the instance of one William Cooper Hobbs calling upon the editor and publishers of a newspaper called the Evening News to show cause why a writ of attachment should not issue against them for an alleged contempt of Court in publishing a report of the charge delivered by the Recorder of London to the grand jury in proceedings against the applicant at the Central Criminal Court on February 3, 1925. The ground of the rule is that the report is calculated to prejudice the fair trial of Hobbs. It is not disputed that the report complained of is in some sense a report of the charge referred to. The report, however, is challenged in two respects. It is said first, that the report is not a fair and accurate report of this charge to the grand jury; and secondly, that even if it were, a charge to a grand jury does not come within the ambit of proceedings in a Court of justice so as to yield immunity to persons publishing a fair and accurate report of it.

I will deal with the second of these points first. It is now, I think, much too late in the day to argue that newspapers are not entitled to print reports of a charge to the grand jury. It is within the knowledge of all of us that for a long time past such reports have been printed. The principle which applies has been laid down in several cases. Thus in *Lewis* v. *Levy* (1) Lord Campbell C.J., in delivering the judgment of the Court, said (2): "In *Curry* v. *Walter* (3) it was decided, above sixty years ago, that an action cannot be maintained for publishing a true account of the proceedings of a Court of justice, however injurious such publication may be to the character of an individual." And later in the course of the same judgment he said (4): ". . . . although a magistrate upon any preliminary inquiry respecting an indictable offence may, if he thinks fit, carry on the inquiry in private, and the publication of any such proceedings before him would undoubtedly be unlawful, we conceive that, while he continues to sit foribus apertis, admitting into the room

(1) E. B. & E. 537.
(2) Ibid. 557.
(3) 1 Bos. & P. 525.
(4) E. B. & E. 538.

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where he sits as many of the public as can be conveniently accommodated, and thinking that this course is best calculated for the investigation of truth and the satisfactory administration of justice (as in most cases it certainly will be), we think the Court in which he sits is to be considered a public Court of justice. The case of *Curry* v. *Walter* (1) has been often criticised, but never overturned, and often acted upon. And in *Rex* v. *Wright* (2) it received the unqualified approbation of that great judge, Mr. Justice Lawrence, who observed that, though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of justice should be universally known." In the same sense in *Reg.* v. *Gray* (3) Fitzgerald J. said: "It appears to me that the security obtained by publicity for the due administration of justice is this, that it brings to bear on that administration at once the pressure and the support of public opinion—its pressure to prevent intemperance on the part of the judge—to prevent corrupt or improper proceedings, and, on the contrary, its support where justice is administered in a pure, fair, and legitimate manner. It has been said, and said truly, that possibly in particular cases there may be inconvenience to individuals from the early publication of evidence or of statements with respect to matters that are subsequently to be tried more solemnly; but it has been well observed, too, that this inconvenience to individuals is infinitesimal in comparison to the great public advantage given by that publicity." (3)

In my opinion, these remarks apply a fortiori to a report of a charge to a grand jury; and if the report published is a fair and accurate report of the charge, it comes within the privilege which belongs to fair and accurate reports of public proceedings in a Court of justice.

The question remains whether this particular report is fair and accurate. The attention of the Court has been carefully directed to all the various aspects of the matter

(1) 1 Bos. & P. 525. (2) 8 T. R. 293, 298.
(3) 10 Cox, C. C. 184 (Ir.).

and to all the differences between the report published by the newspaper and the note taken by the official shorthand writer. Comparing the two reports, one cannot but observe that in the newspaper report certain phrases do not appear which are in the official report. In the official report, for example, there are certain expressions such as "it is said" which show that it is the evidence as to alleged facts and not facts themselves that are being described, but these expressions do not occur in the newspaper report. It is obvious also that in form and arrangement the published report is not identical with the official note. The order of phrases and passages is different. They are turned about so as to give prominence at the outset to that which in the charge as delivered is the climax at the close. Again, it is plain that, while in the charge the Recorder said in terms that when arrested and charged Hobbs said the charge was absurd, and he was not guilty, no such statement is to be found in the newspaper report. On the other hand it is no less true also that there are phrases in the charge as officially reported and not in the newspaper report on which, if they had been present in the newspaper report, no doubt observation would have been made; such a phrase, for example, as "these clever scoundrels."

It is necessary however to consider the real substance of this complaint. Contempt of Court of this kind is committed where one of two things happen—where matter is published which is intended to prejudice a fair trial; or where matter is published which is reasonably calculated to prejudice a fair trial. Here there is no suggestion that the report was published with any sinister purpose. What is complained of is the probable result of its publication. The passage upon which chief stress is laid is that in which, as it is said, it is conveyed to the reader, and conveyed with all the emphasis of a special headline printed in prominent type in words borrowed from the body of the passage itself, that in the opinion, at any rate, of the Recorder Hobbs was guilty of the offence with which he was about to be charged. Now in the unchallenged official report of that passage the

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words are these: "The evidence in the case is of an extraordinary character, and there can be no doubt, I should say—it is for you to judge—that Hobbs was a party to a gigantic fraud, as monumental and perhaps as impudent a fraud as has ever been perpetrated in the course of our law." What is the meaning, I do not say intended, but likely to be conveyed, by those words? When all due allowance is made for the parenthesis, "it is for you to judge," is it not apparent that the Recorder was saying not merely that in his opinion a true bill should be found, but also that in his opinion the prisoner ought to be convicted? In the newspaper report these words, "It is for you to judge," are omitted. But does the omission of these words so affect the matter as to make what would otherwise be fair unfair, and what would otherwise be accurate inaccurate? I think it is desirable, however unpalatable it may be to do so, to speak a little plainly. It is, to say the least, a serious misfortune that any such charge as this should have been delivered to the grand jury. In the concluding words of the charge the learned Recorder says: "All you have to do is to say whether there is a true bill against Hobbs, and probably it will not take you very long to say that there is." That, one cannot help thinking, was a sufficient and satisfactory way of dealing with the whole matter without any other reference to the case. It would not be right to punish a newspaper for reporting a charge where the real sting of the criticism is directed against the charge itself. There are certain features in this report which excite criticism. I need not reiterate them; they leap to the eye. But upon the question of substance, whether so far as this report contains matter calculated to affect and prejudice a fair trial the fault is to be found with the report or with the charge itself, I am bound to say I cannot have any doubt. It is long indeed since a learned judge vested with the duty of directing or charging a jury in a case about to be tried—a case, indeed, which it is conceivable he might have been called upon to try himself—has prematurely expressed the opinion that the ultimate verdict of the petty jury ought to be of a particular kind.

It is said, and said truly, that upon such an occasion language of a certain kind ought to be avoided because it may be unfair to the accused. I cannot help thinking also that there is perhaps another reason why it should be avoided, and that is that the use of it may afford the accused and those about him a grievance which, skilfully employed, may redound improperly to his advantage. But however that may be, and however open to observation certain features of this necessarily summarized report are, I do not think this is a case in which the newspaper ought to be punished for publishing a report that seems to me, upon the whole, and subject to certain limited exceptions, to be accurate and fair of a charge which ought not to have been delivered in the form in which it was delivered.

I think, therefore, that this rule ought to be discharged.

SALTER J. I agree with every word that the Lord Chief Justice has said.

FRASER J. I agree.

Jowitt K.C. It is desired that the rule should be discharged with costs.

LORD HEWART C.J. In view of certain aspects of the matter the Court is of opinion that there should be no order as to costs.

Order nisi discharged without costs.

Solicitors: *Lewis & Lewis; Carter & Bell.*

J. R.

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Dec. 8.
C. A.
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Feb. 25, 26, 27; *March* 2.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

CANTIERE NAVALE TRIESTINA *v.* HANDELSVERTRETUNG DER RUSS. SOZ. FÖD. SOVIET REPUBLIK NAPHTHA EXPORT.

Shipping—Charterparty—Demurrage—Lay Days—Ship leaves Port of Loading after Lay Days have commenced to run—Whether Lay Days continue to run during Absence of Ship from Port—Exceptions Clause—Restraint of Princes—Vis Major—Illegality.

A charterparty of an Italian ship provided that 216 running hours (Sundays and holidays excepted), weather permitting, should be allowed the charterers for loading and discharging, and that the lay days should commence from the time the steamer was ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth. The exceptions clause excepted "restraint of princes, rulers and people." The ship arrived at Batoum, and notice of readiness to load was given, and the lay days began to run. Owing however to a dispute between the Russian and Italian Governments the ship was ordered by the port authorities to leave Batoum and also Russian waters, and accordingly the ship went to Constantinople. Subsequently permission was obtained to load the ship at Batoum, and she returned after being absent from the port a little over a fortnight. The owners subsequently claimed demurrage from the charterers, on the basis that the lay days continued to run during the period the ship was absent from Batoum:—

Held, by the Court of Appeal (reversing the decision of Roche J.):

(1.) That the lay days continued to run notwithstanding that the ship was compelled to leave the port by order of the port authorities.

(2.) That the interference by the Russian Government did not amount to such an illegality as to excuse the performance of the contract.

(3.) That the exceptions clause in the charterparty excepting arrests and restraints of princes, rulers and people enured only for the benefit of the shipowners and did not extend to the charterers.

Statement in Scrutton on Charterparties and Bills of Lading, 11th ed., art. 129, p. 342, that "If the ship has to be removed from the port, or becomes unfit for loading or discharging, e.g. by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage," dissented from.

Ford v. *Cotesworth* (1870) 5 Q. B. 544 and *Cunningham* v. *Dunn* (1878) 3 C. P. D. 443 distinguished.

AWARD by an umpire stated in the form of a special case.

1. By a charterparty dated October 16, 1922, and made between Cantiere Navale Triestina of Trieste, owners of the Italian tank steamer called the *Dora* (hereinafter called "the

owners "), and Handelsvertretung der Russ. Soz. Föd. Soviet Republik Naphtha Export of Hamburg, Charters (hereinafter called " the charterers ") the *Dora*, then discharging at Rouen, was chartered to proceed to Batoum, and there load a full and complete cargo of pale lubricating oil, and being so loaded therewith to proceed (as ordered on signing bills of lading) direct to Antwerp or Rotterdam in charterers' option and deliver the same.

2. The matter in dispute in the arbitration was the owners' claim for demurrage and for certain charges and expenses and for interest on the sums alleged to be due.

3. The most material provisions of the charterparty were as follows :—

" (5.) Two hundred and sixteen running hours (Sundays and holidays excepted), weather permitting, shall be allowed the charterers for loading and discharging, the charterers having the right of loading and discharging during the night, paying all extra expenses.

" (7.) The laying days shall commence from the time the steamer is ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth.

" (8.) The demurrage shall be payable at the rate of 130*l.* per running day, but if by accident a delay should take place at port of loading, or discharge by fire or breakdown of machinery of charterers, the rate of demurrage shall be reduced to 65*l.* per running day for the time so lost and pro rata for part of a day.

" (9.) The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, assailing thieves, arrest and restraint of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by the negligence, default or error in judgment of the pilot, master, mariners or other servants of the shipowners. Ship not answerable for losses through explosions, etc.

" (11.) Owners to have an absolute lien upon the cargo for all freight, dead freight, demurrage and costs of recovering the same.

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CANTIERE NAVALE TRIESTINA v. RUSSIAN SOVIET NAPHTHA EXPORT AGENCY.

"This charter is subject to charterers' approval of the cleanliness of vessel's tanks for the carriage of pale lubricating oil. Charterers undertake to inspect vessel's tanks at Rouen, and if approved such inspection and approval to be final."

4. On October 31, 1922, a telegram was sent from Moscow to the Soviet Authorities at Batoum in the following terms: "In view of the aggressive policy of the Italian Government such as arresting our goods, you are requested to close at once the branch of Lloyd Triestino: not to send goods to Italy: to stop the chartering of Italian steamers: to stop the admittance of Italian steamers to our ports: and to suspend generally any commercial relations with Italy. This decision is made in accordance with Narkominodal. Please confirm fulfilment. Oct. 31st. No. 2451. (Sgd.) Assistant Commissar for Foreign Trade Froumkin."

5. The tanks of the *Dora* had been inspected and approved on behalf of the charterers before she left Rouen. The *Dora* arrived in Batoum Roads early in the morning of Sunday, November 5, and about 8 A.M. on the same day the sanitary medical officer came on board, and she got free pratique. About two hours later the maritime police came on board, closed and sealed the vessel's wireless, and informed the master that all communication with the shore was prohibited. This prohibition continued till 5 P.M. on the next day, November 6, when the Chief of the Local Maritime Authorities came on board and informed the master that the prohibition was raised and that the master and crew were free to go ashore. Owing to the lateness of the hour the master did not go ashore that day, but he took the opportunity of sending ashore a letter addressed to the local agency of "Naphtha Export" informing them of the arrival of the *Dora*. There was no evidence that this letter was ever received by the agents. The next day, November 7, was a general holiday, being the anniversary of the Bolshevist Revolution. On November 8 the master went ashore, and at 8 A.M. gave notice to the charterers' agents of the arrival of the *Dora* and that she was ready to load, and the agents accepted the notice and said that they would load the *Dora* first turn after the

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oil steamer *Ramella*, a British steamer, expected to finish loading that evening or the following morning. At Batoum petroleum is loaded in a special part of the port called the Petroleum Harbour. When the master gave the agents notice on this day the *Dora* was ready to load and ready to enter the Petroleum Harbour as soon as the charterers had a berth for her. The lay hours under the charterparty began to run from 2 P.M. on November 8.

6. About 2 o'clock of the afternoon of November 8, while the *Dora* was lying in the Roads, a motor launch with an officer and some soldiers came to the *Dora* and ordered her to leave Russian waters. The master of the *Dora* protested, and said it was impossible for him to leave without the vessel's health certificate. The officer thereupon left. Shortly afterwards a doctor of the health authorities came on board with the health certificate and with an order in Russian, which was translated into English to the master of the *Dora* as follows: "With this note I let you know that at present the S.S. *Dora* under your command cannot take cargo here. This order does not depend on us. I give you the bill of health and compel you to sail away from Batoum anywhere you like and please." This was signed and stamped by the Chief of the Maritime Authorities, Batoum. The master again protested and insisted upon seeing the authorities. This was allowed, and he was taken before the Chief of the Maritime Authorities who, after hearing the master, withdrew the order, giving the master four hours to await further orders. At 11 P.M. an official of the Maritime Authorities came on board and gave the master a fresh order, that the steamer must leave Batoum Roads not later than midnight. The *Dora* accordingly left Batoum Roads at 11.30 P.M. on November 8. She proceeded to Constantinople, the nearest convenient non-Russian port, and arrived at Constantinople at 4 P.M. on November 11.

7. After the *Dora* left Batoum representations were made by the agent at Moscow of the Italian Government, by the owners of the *Dora*, and by the charterers, to the Russian Government, with the result that permission was obtained

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to load the *Dora* at Batoum. It was thereupon arranged by the owners and charterers that the *Dora* should return to Batoum and load. The *Dora* remained at Constantinople awaiting orders till November 21, on which day at 5 P.M. she received telegraphic orders to return to Batoum to load. The *Dora* accordingly left Constantinople at 10 A.M. on November 22 for Batoum. The *Dora* arrived and anchored in Batoum Roads at 4.30 P.M. on Saturday, November 25. At 8 P.M. an officer of the military section of the port came on board and informed the master that he would not allow free pratique, because the orders about Italian ships had not yet been revoked. He, however, gave permission for the *Dora* to remain at anchor until the case of the *Dora* was cleared up. At 4 P.M. on November 28 the military chief sent a note on board saying that orders had been received to allow the *Dora* to load. At 8 A.M. on November 29 the Health Doctor came on board and gave free pratique. In the evening, a pilot having come on board, the anchor was raised and the *Dora* was proceeding to a loading berth when orders came that the *Dora* was not to proceed inside, but was to remain at anchor in the Roads, and the *Dora* again anchored. On the morning of November 30 at 7.45 A.M. a pilot came on board with orders from charterers for the *Dora* to proceed to the loading berth. The *Dora* accordingly entered the harbour and attempted to moor alongside the berth, but the weather was too bad to permit this to be done. The *Dora* was compelled by the weather to lie some distance off the loading berth, and as the weather got worse on December 1, the *Dora* was by reason of the weather obliged to leave the harbour and anchor again in the Roads. On December 2 the weather improved, and in the afternoon the *Dora* was able to enter the harbour again, and she was moored at the loading berth about 3 P.M. At 8.15 P.M. on the same day the loading began. The loading was finished at 8 A.M. on December 5.

8. If the lay time ran continuously (Sundays and holidays excepted) from 2 P.M. on November 8 to 8 A.M. on December 5, when the loading was completed, the 216 hours (or 9 days),

allowing for a Sunday, expired at 2 P.M. on November 18, and the *Dora* was 16 days, 18 hours on demurrage at Batoum.

If the time when the *Dora* was not at Batoum, from 11.30 P.M. on November 8 to 4.30 P.M. on November 25, did not count, and allowance was made for Sundays and for bad weather, 5 days, 13 hours of the lay time allowed had been used when the loading was completed. If time did not count until the charterers ordered the *Dora* to a loading berth on November 30, and allowance was made for bad weather and for a Sunday, 1 day, 20 hours of the lay time allowed had been used when the loading was completed.

9. It was contended on behalf of the owners that the charterers were responsible for all delays caused by the action of the Russian Government on the ground (1.) that the charterers were the Russian Government and responsible for all delay caused by their own acts, and (2.) if the charterers were not the Russian Government that there were no exceptions in the charterparty which excused the charterers from liability for the delay in loading the *Dora* caused by the action of the Russian Government. The umpire found the following facts: In 1918 the naphtha industry in Russia was nationalized, and the management was entrusted to the General Naphtha Committee attached to the Fuel Department of the Superior Council of National Economics. In 1922 this management was superseded as from October 1, 1922, by the formation of the All Russian Oil Syndicate, commonly called the Naphtha Syndicate, the promoters and members of the Syndicate being the State Oil Trusts, Aznepht Grosnepht and Embanepht. This syndicate was formed for the purpose of carrying on the trade in oil products under the general direction of the Superior Economic Council and the Head Fuel Administration. By its articles of association (ratified and approved by the Russian Government) the Naphtha Syndicate was to enjoy all the rights of a legal entity and to carry out independently in its own name for its own account all kinds of trading operations. The articles further provided that the responsibility of the Syndicate to a third party should be confined to the property belonging to it, and that neither the State nor the Oil Trusts

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should be responsible for the liabilities of the Syndicate. Subsequently by supplemental regulations as to export administration of the Naphtha Syndicate an "Export Administration" was formed as a department of the Syndicate, subordinate to the Syndicate in all matters, it being also provided by these regulations that "the Export Administration shall at the same time carry on its work in full contact with the People's Commissariat for Foreign Trade and under the control of the latter." It was also provided that the Export Administration (or "Naphtha Export" as it was called) should carry out its export-import work through the medium of "Arcos" and the Trade Delegations of the People's Commissariat of Foreign Trade with the right of attaching to such its own branches and representatives. The charterparty of the *Dora* was made between the owners and "Handelsvertretung der Russ. Soz. Föd. Soviet Republik Naphtha Export Charterers of Hamburg," and was signed "Handelsvertretung in Deutschland der R. S. F. S. R. (Naphtha Export) Zweigstelle Hamburg B. Feurich." The umpire found that the charterparty was a contract by the Export Administration of the Naphtha Syndicate made as required by the above regulations through the medium of the Hamburg branch of the Trade Delegation in Germany of the Russian Federation of Soviet Republics. The umpire found that it was not a contract with the Russian Government, but with the Naphtha Syndicate. The umpire held on the construction of the charterparty that there were no exceptions therein which excused the charterers from liability for the delay in loading caused by the acts of the Russian Government.

10. While the *Dora* was loading there were some negotiations between the agents of the owners and the agents of the charterers as to an alteration of the port of discharge and as to orders for port of discharge being given in the course of the voyage—i.e., at Gibraltar—any delay in giving orders to be paid for at the demurrage rate. Meantime the loading was completed, and bills of lading were signed for Constantinople for orders. The *Dora* arrived at Constantinople on December 8 at 4 P.M., and the master was requested by the charterers'

agents to wait a day at Constantinople to enable the agents to obtain orders. The *Dora* accordingly waited a day at Constantinople, and it was agreed at the hearing that one day's demurrage was payable by the charterers for this delay.

11. The *Dora* was ultimately ordered to discharge at Ostermoor, and the charterers were informed that the owners would exercise their lien for demurrage claimed and for freight which was payable under cl. 2 of the charterparty at discharging port before commencing delivery of the cargo. The *Dora* arrived, and was moored at a discharging wharf at Ostermoor about noon on December 28. Notice was given by the master at 1 P.M., and the lay time began to run from 7 P.M. on December 28. There was some delay in paying the freight, and discharge did not commence till 5 P.M. on December 30. The discharge was completed about 10 A.M. on January 3, the total time occupied in discharging being 6 days, 15 hours, not counting Sunday, December 31.

12. If the *Dora* was on demurrage at Batoum, then demurrage for a further 7 days, 15 hours, was incurred at Ostermoor, making together 24 days, 9 hours, demurrage. If only 5 days, 13 hours of the lay time were used at Batoum, then the total demurrage was 3 days, 4 hours. If only 1 day and 20 hours of the lay time were used at Batoum, then no demurrage was incurred.

13. It was contended for the charterers that there was some delay in discharging at Ostermoor caused by the delay of the master in posting the bills of lading, and also by payment of freight being required in a manner not provided for by the charterparty. The umpire found as a fact that there was no delay by the master and no wrong claim as to the freight, and further that no delay in discharging was attributable to either of these matters.

14. The owners also claimed from the charterers 875*l.*, as the cost of fuel consumed in proceeding from Batoum to Constantinople and back to Batoum, together with 120*l.* for dues incurred at Constantinople. The umpire held that these sums were not payable by the charterers. The owners also claimed 384*l.* 10*s.* 11*d.* for extra expenses at Batoum and

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Ostermoor. The umpire found that under cl. 5 of the charter-party the charterers were liable to pay 46*l.* 17*s.* 11*d.* claimed in respect of overtime. No explanation was given showing how the other expenses claimed were incurred or why they were payable by the charterers, and the umpire found that the charterers were under no liability for those other expenses.

The owners also claimed 260*l.* 8*s.* 4*d.* for the expenses of a representative sent to Moscow in connection with the negotiations that followed on the *Dora* being ordered to leave Batoum after her arrival on November 5. The umpire found that the charterers were not liable for those expenses.

The owners also claimed interest on all the amounts claimed by them. The umpire found that the owners were not entitled to interest, except in so far as they were entitled to a proportionate part of any interest accrued on the sum deposited in bank, as hereinafter appears.

15. The owners having exercised their lien at Ostermoor, the freight was paid, and a sum of 5472*l.* was deposited by or on behalf of the charterers in Hambro's Bank, London, in respect of the other claims by the owners, to abide the result of the arbitration.

16. The umpire was of opinion that the lay hours ran continuously from 2 P.M. on November 8, and that none of the exceptions applied to excuse the charterers from liability for the delays caused by the acts of the Russian Government. On that basis the charterers were liable for 24 days, 9 hours, demurrage, or a sum of 3168*l.* 15*s.*

17. Subject to the opinion of the Court the umpire awarded and determined that there was due and payable by the charterers to the owners the following sums: (1.) 130*l.* for the admitted detention of one day at Constantinople waiting for orders, (2.) 46*l.* 17*s.* 11*d.* for overtime, and (3.) 3168*l.* 15*s.* for demurrage, in all the sum of 3345*l.* 12*s.* 11*d.* And the umpire awarded that the charterers should pay and release to the owners 3345*l.* 12*s.* 11*d.*, part of the sum deposited in Hambro's Bank, together with a proportionate part of the interest accrued on the deposit. He also awarded that the charterers

should pay the costs of the award, and that they should pay to the owners their costs of the reference.

18. The question for the opinion of the Court was whether, on the true construction of the charterparty and on the facts stated herein, the award of the umpire for 3168*l.* 15*s.* for demurrage was right.

19. If the Court was of opinion that the award was right, then the award should stand. If the Court was of opinion that the award for 3168*l.* 15*s.* for demurrage was wrong, the award for that amount should be set aside, and the umpire awarded such sum for demurrage as the Court might decide to be the correct amount.

Claughton Scott K.C. and *G. P. Langton* for the charterers. The exceptions clause is a mutual one, and therefore the exception of "arrests and restraint of princes, rulers and peoples," enures for the benefit of the charterers as well as the shipowners: *In re Newman and Dale Steamship Co. and British and South American Steamship Co.* (1); *Barrie* v. *Peruvian Corporation* (2); *Ralli Brothers* v. *Compania Naviera Sota y Aznar.* (3) Where a ship has to leave her port of loading or discharge by order of the authorities, the lay days do not run during the period of time the ship is absent from the port, and that period must be deducted in calculating the time the ship is on demurrage: see Scrutton on Charterparties and Bills of Lading, 11th ed., art. 129, p. 342, and the case there cited of *Tyne and Blyth Shipping Co.* v. *Leech.* (4) The *Dora* was not ready and willing to load her cargo on November 8. Ready and willing to load must mean that the ship is able to load and in a position to do so. The *Dora* was not able to load or in a position to do so on that date: see *Good & Co.* v. *Isaacs.* (5) A ship cannot be said to be an arrived ship in the sense that she is ready to load unless she has the consent of the local authorities to enable her to load: *The Austin Friars.* (6) In the present case, as the *Dora* had not received

(1) [1903] 1 K. B. 262.
(2) (1896) 2 Com. Cas. 50, 53.
(3) [1920] 1 K. B. 614, 635.
(4) [1900] 2 Q. B. 12.
(5) [1892] 2 Q. B. 555.
(6) (1894) 10 Times L. R. 633; 7 Asp. M. L. C. 503.

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the permission of the harbour authorities to load she cannot be considered an arrived ship. There is an implication in a contract that the performance of the contract shall be lawful: *Ford* v. *Cotesworth*. (1) In the present case the performance of the contract would have been contrary to the orders of the Russian Government and therefore unlawful.

Raeburn K.C. and *Sinclair Johnston* for the shipowners. The three cases cited for the proposition, that the exception of restraint of princes is mutual and therefore available for the charterers, are very unsatisfactory. *Barrie* v. *Peruvian Corporation* (2) contained a very unusual exceptions clause. The decision in that case was followed by Bigham J. in *In re Newman and Dale Steamship Co. and British and South American Steamship Co.* (3) with considerable doubt. The exceptions clause in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (4), having regard to the later words in the clause, was obviously a clause in favour of the shipowners. There are also three cases in which the decisions were that the exceptions clause was not mutual, but for the owner's benefit only: *Braemount S.S. Co.* v. *Andrew Weir & Co.* (5); *Aktieselskabet Frank* v. *Namaqua Copper Co.* (6); and *Aktieselskabet General Gordon* v. *Cape Copper Co.* (7) It is clear on the face of the exceptions clause in the present case that it is a clause in favour of the shipowners. The parties have provided a complete code with regard to the charterers' obligations in other clauses. The umpire found that the *Dora* was ready to load on November 8, and that the charterers' agents accepted the notice, and that therefore the obligation of the charterers to load began at 2 P.M. on November 8. When lay days have commenced to run they continue to run, and they do not cease to run unless there has been some breach of duty on the part of the shipowners which prevented the charterers loading the cargo on board. There is no authority to the contrary. A shipowner fulfils his obligation if his ship is at the place of loading

(1) L. R. 5 Q. B. 544.
(2) 2 Com. Cas. 50.
(3) [1903] 1 K. B. 262.
(4) [1920] 1 K. B. 614.
(5) (1910) 15 Com. Cas. 101, 108.
(6) (1920) 25 Com. Cas. 212, 217.
(7) (1921) 26 Com. Cas. 289, 293, 297.

at a time when the charterer is able to load. There is no obligation on the shipowner to keep his ship at the port of loading all the time if the charterer is not ready to load. Of course, if a shipowner takes his ship away from the port of loading he runs the risk of something happening which will prevent the lay days running. But if the ship returns to the port of loading by the time the charterer is ready to load the shipowner has fulfilled his obligation. If the *Dora* had remained at Batoum for the fortnight after she became an arrived ship the charterers could not have loaded her. The cases of *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn* (2) are dealt with in Scrutton on Charterparties and Bills of Lading, 11th ed., p. 358, art. 133, note (q), where it is pointed out how they may be reconciled with other cases in which there is a definite time for loading or unloading. The decision in *The Austin Friars* (3) was that she was not ready to load because she had not obtained free pratique. That case does not carry the point any further. There is no authority on the point whether lay days run when the ship is away from the port of loading.

[*Metropolitan Water Board* v. *Dick, Kerr & Co.* (4) was also cited.]

ROCHE J. This is an award stated by an umpire in the form of a special case in an arbitration between shipowners and charterers. The claim of the shipowners was for demurrage. The umpire has awarded the shipowners a sum of 3168*l.* 15*s.* for demurrage. He has given alternative calculations and findings, which would give a much less sum for demurrage—namely, a sum computed on the basis of the ship having been some 3 days and 4 hours on demurrage instead of 24 days, 9 hours on demurrage, which is the period represented and covered by the award of 3168*l.* 15*s.* The question submitted by the umpire for the decision of the Court is: whether on the true construction of the charterparty and on the facts stated herein his award of 3168*l.* 15*s* for demurrage was right.

(1) L. R. 5 Q. B. 544.
(2) 3 C. P. D. 443.
(3) 10 Times L. R. 633; 7 Asp. M. L. C. 503.
(4) [1918] A. C. 119.

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The facts as found by the umpire may be summarized compendiously as follows: An Italian tank steamer called the *Dora* was chartered by a body carrying on business in Russia, which is found by the umpire to be what we should call a corporation or legal entity independent of, in the sense that it is separate from, the Government of that country, although its management is under the control or direction of the Government and although the oil industry with which this corporation deals is said to have been nationalized by the Government. The charterparty was for the loading of a cargo of oil in the tank steamer *Dora* at the port of Batoum. The ship arrived at Batoum, but at that time there was some dispute of a diplomatic nature between the Russian Government and Italy, and some persons whose names are given, but whose relations to the superior Government, and whose authority under the law of the land, if any, is not specified or found, sent the ship away from Batoum after she had been at that port for some hours and after she had given notice of readiness to load. She went away on November 8 after protest and after some negotiations with the authorities, and being ordered to leave not merely Batoum but also Russian waters, she went to the nearest non-Russian port—namely, Constantinople. After certain negotiations she returned to Batoum and arrived back on November 25. The loading was not begun until December 2. Some of the period of delay between November 25 and December 2 was occasioned by bad weather, and the obligations of the charterers to load, which otherwise were absolute in the sense that a fixed time or rate for loading was provided for, were qualified by the words "weather permitting," and the umpire has deducted, in the material calculation, the period when time was lost between November 25 and December 2 by bad weather. But from and after November 25 the *Dora* was at Batoum again and was ready to load. The delay which was occasioned otherwise than by bad weather during that period seems to have been caused by a misunderstanding between some authority at Moscow and the local authorities.

There are obviously two periods as to which different

considerations may apply. The first period is November 8 to November 25, when the *Dora* was either under orders to leave Batoum or was actually away from Batoum. The other period is a shorter period when she had arrived back at Batoum after this interference with her movements had been removed and she was allowed back into the port and was allowed to load.

The argument before the umpire seems to have taken a rather different course from that which it has taken before me. The points taken on behalf of the charterers seem to have been threefold: The first point was that what happened was a restraint of princes, and that the charterers were protected by an exception of restraint of princes from responsibility for delay so caused. The second point was that it was an implied term of a contract such as this that performance should be lawful, and that in the circumstances the performance of this contract was illegal and unlawful by the law of the country where the performance was due. The recent case of *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1) in the Court of Appeal was cited in support of that contention. The third point was that, at all events, the ship was not lying at the port during a considerable part of the time which is in dispute, and that it could not be claimed on behalf of the shipowners that lay days would count during the period she was not lying at the port.

At the arbitration the third point seems to have become rather obscured and attention to have been mainly directed to the question of restraint of princes. To the plea of that exception the shipowners replied with a point which raised considerable difficulty and was one of considerable interest. They set up the contention that the charterers and the Government of Russia who had imposed the restraint were one and the same persons, and that the charterers could not rely upon a clause which they had put into operation themselves. Therefore the argument at the hearing of the case, as is frankly borne out by the statement of Mr. Langton as to what happened and as is more clearly

(1) [1920] 2 K. B. 287.

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evidenced if possible by the finding of the umpire in para. 16 of the case, seems to have been almost, if not entirely, limited to the question of the operation of the exceptions clause and the merits or validity of the replication to the plea on that point set out by the charterers. The umpire in para. 16 of the case says that he was of opinion that the lay hours ran continuously from 2 P.M. on November 8, and that none of the exceptions applied to excuse the charterers from liability for the delays caused by the acts of the Russian Government. On that basis the charterers were liable for 24 days, 9 hours, demurrage, or a sum of 3168*l.* 15*s.*

All the three points have been raised again before me by the charterers.

[*Langton.* I am afraid that I have misled your Lordship. I did not make the point that the vessel was not at the port. I made the point that the vessel was not ready.]

Mr. Langton corrects me by saying that he did not make the point that the vessel was not present at the port. That is unfortunate, but nevertheless I propose to base my decision on that point, because I think that it appears on the face of the case and is involved in the question: "Whether on the true construction of the charterparty and on the facts stated herein my award"—that is, the award of the umpire—"is right." I was under the impression that Mr. Langton was referring to that point when he quoted the case of *The Austin Friars.* (1) Those three points were therefore either taken before the umpire or appear upon the face of the award, and I have to consider what my decision is with regard to them.

I do not propose to decide the point whether the exception of restraint of princes is or is not mutual and is available on behalf of the charterers, because for other reasons I think that the charterers are entitled to succeed to the same extent as they would succeed if the clause was mutual. I will only say that that point has been argued before me. The principle with regard to it is clear. It is laid down by the Court of Appeal in *Aktieselskabet General Gordon* v. *Cape Copper Co.* (2) The principle is that in each case the question

(1) 7 Asp. M.L.C. 503; 10 Times L. R. 633. (2) 26 Com. Cas. 289.

whether an exception such as this enures for the benefit of one party only or for both parties, depends upon the construction of the charterparty. I am inclined at present to think, for the reasons advanced by Mr. Raeburn, particularly the presence of other clauses dealing with the obligation to load, that if my decision on this point were necessary, it would not be in favour of the charterers, but would be in favour of the shipowners.

But there is another point which seems to me to be conclusive against the contentions of the shipowners. Between November 8 and November 25 the ship was not at the port where she was to be loaded by reason of the cause which the umpire finds. Briefly stated the cause was that the authorities at the port whose orders would be enforced sent her away, and she accordingly left the port. She did not go away, as has been suggested in argument by Mr. Raeburn, because the charterers could not load her and she might conveniently wait somewhere else. She went away because she had to go away. Counsel on behalf of the charterers cited as part of his argument art. 129 of Scrutton on Charterparties and Bills of Lading, dealing with demurrage, which is as follows: "If the ship has to be removed from the port, or becomes unfit for loading or discharging, e.g. by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage." The first observation that I desire to make with regard to that passage is that it is directed to a demurrage period, but I think it is clear that the argument is the same, and the conclusion must be the same, if indeed it is not a fortiori, with regard to the period of lay days. The second observation that I desire to make is that the authority cited for that proposition—namely, *Tyne and Blyth Shipping Co.* v. *Leech* (1)—is a decision on some other matter, and that so far as the proposition laid down in the text-book is founded on that case it is founded on the fact that counsel for the shipowners did not venture or care to claim demurrage in respect of a period in which the vessel was absent from the port. Therefore I think the proposition must stand or fall on

(1) [1900] 2 Q. B. 12.

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its own merits. In my opinion the proposition is sound. There may be exceptions to that proposition, as, for example, if the facts are such as Mr. Raeburn put, a declaration of the charterers that they will not or cannot load, and then the ship leaves the port and goes to some other place as a convenient place of waiting. That is one matter. But speaking generally, in order that lay days may count, it is necessary that the ship should continue to lie at the port at which the lay days are to count and at which the loading is to be done. In the present case, through no breach of contract on the part of the shipowners, but by a misfortune which was, as regards the shipowners, covered and excused by the exceptions clause, the ship had to go away from the port where she was to be loaded. In my judgment during that period the lay days do not and cannot count for the benefit of the owners of the *Dora*.

That being my decision it is unnecessary for me to decide the other point that was taken as to the implication of a term in the contract that the parties should be excused, if through the operation of the law of the land the performance of the contract was not possible. In my judgment there are no facts found in the case which would carry the matter further as a matter of days than it is carried by the ground which I have just decided, and lastly, and more important, there are no facts found in this case such as are necessary for the determination of the question whether in law in the circumstances of this case such a contract should be implied or such an illegality was in existence. There is no finding whether the acts and doings of the various authorities, whether central or local, were capricious or were lawful, or by what law or right they were done; whether they were merely temporary, as would rather appear to be the case, or whether they were permanent and continuous, at any rate until revoked or the law were altered.

In those circumstances I am unable to embark on the difficult question which has been adumbrated rather than fully argued before me, on this point of the operation of foreign law, which was fully discussed in the case of *Ralli Brothers* v.

Compania Naviera Sota y Aznar (1), to which I have already referred, and in a number of other authorities which, if they have to be considered again, as I think it highly possible, had certainly better be considered in a case where their consideration is necessary for the decision of the case. Having regard to the state of the authorities I think it is probable that they will have to be considered in a Court higher than this one.

The result of my decision is that I say the award is correct on the true construction of the charterparty and on the facts stated therein, so far as it awards demurrage for 3 days and 4 hours, but incorrect in so far as it awards other or further demurrage.

R. F. S.

The shipowners appealed. There was also a cross-appeal by the charterers, who contended that they were not liable for any demurrage. The appeal and cross-appeal were heard on February 25, 26, 27, 1925.

Raeburn K.C. and *Sinclair Johnston* for the appellants. The only part of the decision against which the appellants appeal is that part of it which decides that the days during which the vessel was away from Batoum were excluded from counting as lay days.

When the lay days have once commenced to run, charterers who have undertaken to load a ship within a fixed time or at a fixed rate can only escape liability for demurrage by showing that the ship was not loaded owing to the shipowners' default. The fact that the ship went to Constantinople made no difference, because if she had remained at Batoum she could not have loaded any oil. It is clear that if the ship had remained at anchor at Batoum instead of going away, the owners would have been entitled to the full demurrage.

The proposition in Scrutton on Charterparties and Bills of Lading, 11th ed., art. 129, p. 342, that if a ship has to be removed from a port the period of such removal will be cut out from the period of demurrage, is not supported by the

(1) [1920] 2 K. B. 287.

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case there cited of *Tyne and Blyth Shipping Co.* v. *Leech* (1), which, if carefully read, destroys the proposition. Unless the shipowner is in default, he is entitled to demurrage if the ship is not loaded or discharged within the lay days: *Thiis* v. *Byers* (2); *Budgett & Co.* v. *Binnington & Co.* (3); *Barker* v. *Hodgson.* (4)

It is not a necessary condition precedent to the lay days running or continuing to run that the shipowner should do something, or that the ship should be somewhere, which in the circumstances would be useless and make no difference to the charterers: *Armement Adolf Deppe* v. *John Robinson & Co.* (5); Scrutton on Charterparties and Bills of Lading, 11th ed., p. 211. It is true that the ship was obliged to go away from Batoum, but even if she had gone away voluntarily, the lay days would have continued to run. The lay days began to run on November 8, and continued to run, and the shipowners are entitled to demurrage from the time when the lay days expired. *Jones* v. *Adamson* (6) was also cited.

Claughton Scott K.C. and *G. P. Langton* for the respondents. The time during which the vessel was away from Batoum cannot count as lay days, and no demurrage was payable in respect of it: see Scrutton on Charterparties and Bills of Lading, 11th ed., art. 129, p. 342, where it is stated that: "If the ship has to be removed from the port, or becomes unfit for loading or discharging, e.g., by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage." In *Tyne and Blyth Shipping Co.* v. *Leech* (1) there was no admission that the vessel was on demurrage after the date when the collision took place. There is no case in which a charterer has been held liable for demurrage when the ship herself was not at the port of loading and ready for loading. The *Dora* was not ready for loading on November 8, and the lay days therefore did not commence to run: *John & James White* v. *S.S. Winchester Co.* (7)

(1) [1900] 2 Q. B. 12.
(2) (1876) 1 Q. B. D. 244.
(3) [1891] 1 Q. B. 35.
(4) (1814) 3 M. & S. 267, 270.
(5) [1917] 2 K. B. 204.
(6) (1875) 1 Ex. D. 60.
(7) (1886) 23 S. L. R. 342; 13 R. 524.

The ship must be available to the charterer for loading, and not merely be at the port: *The Austin Friars* (1); *Good & Co.* v. *Isaacs.* (2) The words "berth or no berth" do not affect the situation; she must be ready to load and have the permission of the authorities to load, whether she is at the berth or in the roads.

It was an implied term of this contract that the performance of it should not be illegal, and according to the law existing at Batoum it was illegal, and the respondents therefore are not liable; Dicey's Conflict of Laws, 3rd ed., p. 597; *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (3), in which case Scrutton L.J. questioned the decision in *Blight* v. *Page* (4), where it was held a foreign illegality is no defence to an action for damages for breach of a contract. The present case falls within the decisions in *Ford* v. *Cotesworth* (5) and *Cunningham* v. *Dunn.* (6)

The exception of restraint of princes, rulers and people in cl. 9 of the charterparty is a mutual exception and enures for the benefit of the charterers as well as of the shipowners: *In re Newman & Dale Steamship Co. and British and South American Steamship Co.* (7) As the ship was prevented from being loaded by the orders of the Soviet Government, the charterers are excused for the delay thereby caused.

[ATKIN L.J. referred to Scrutton on Charterparties and Bills of Lading, 11th ed., p. 234.]

Bailhache J. held in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (8) that the exception of "restraint of princes" was a mutual exception and enured for the benefit of the charterers as well as of the shipowners.

Raeburn K.C. in reply. If a charterer has agreed to load or unload within a fixed period of time he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by

(1) 10 Times L. R. 633.
(2) [1892] 2 Q. B. 555.
(3) [1920] 2 K. B. 287.
(4) (1801) 3 Bos. & P. 295n.
(5) L. R. 5 Q. B. 544.
(6) 3 C. P. D. 443.
(7) [1903] 1 K. B. 262.
(8) [1920] 1 K. B. 614, 635.

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exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible: *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (1), where all the authorities are referred to.

There was here no frustration of the adventure to excuse the charterers from the performance of the contract. Neither was there any permanent illegality in the performance of the contract, but a mere temporary restraint of princes. The Court cannot imply a condition that if there is a temporary restraint of princes the charterers shall be excused when the parties have dealt with the matter in the contract themselves, and have said that the exception of restraint of princes shall apply only to the shipowners.

Ford v. *Cotesworth* (2) is no authority on the matter now under discussion, as in that case no fixed time for loading was stipulated for. In *Cunningham* v. *Dunn* (3) the contract could not be performed by either side owing to the operation of the Spanish law. In that case the parties must be taken to have contracted on the basis that it should be legally possible to load the ship. Here the alleged illegality has nothing to do with the matter.

[SARGANT L.J. It really all comes back to what Lord Lindley L.J. said in *Budgett & Co.* v. *Binnington & Co.* (4): "On whom does the risk of strikes fall in a contract such as this, in which that risk is not expressly excepted from the risks which the freighter is to bear?"]

The prohibition which prevented the loading of the cargo in *Cunningham* v. *Dunn* (3) was permanent, but in the present case it was not permanent. A mere temporary interruption does not annul the contract, if it is such that it does not prevent the agreement being carried out within a reasonable time, having regard to the terms of the contract itself: *Andrew Millar & Co.* v. *Taylor & Co.* (5); see also *Leiston Gas Co.* v. *Leiston-cum-Sizewell Urban Council.* (6) To make a case of illegality the illegality must be permanent:

(1) [1920] A. C. 88, 94, 97.
(2) L. R. 4 Q. B. 127.
(3) 3 C. P. D. 443.
(4) [1891] 1 Q. B. 35, 39.
(5) [1916] 1 K. B. 402, 414.
(6) [1916] 2 K. B. 428, 438, 439.

Metropolitan Water Board v. *Dick, Kerr & Co.* (1) In *Blight* v. *Page* (2) the foreign illegality was held to be no defence to an action for damages, as the exception of restraint of princes was not mutual. That exception was held to be mutual in *Barrie* v. *Peruvian Corporation* (3); *In re Newman & Dale Steamship Co. and British and South American Steamship Co.* (4); *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (5) (by Bailhache J., the point not being dealt with by the Court of Appeal). On the other side it was held not to be mutual in *Aktieselskabet General Gordon* v. *Cape Copper Co.* (6); *Braemount S.S. Co.* v. *Andrew Weir & Co.* (7); and *Aktieselskabet Frank* v. *Namaqua Copper Co.* (8) The charterers here cannot escape liability for demurrage unless they can point to an exception which excuses them in plain words, and that they cannot do: *Elderslie Steamship Co.* v. *Borthwick.* (9) The ship must be ready when she gives notice of readiness to load. But at the time that notice was given the *Dora* had not been prohibited from loading.

John & James White v. *S.S. Winchester Co.* (10) and *The Austin Friars* (11) were both cases of quarantine, and it was held that until a ship gets pratique she would be disqualified from loading her cargo. Those cases have no application to the present case. The judgment should have been in the appellants' favour for the full amount found by the award.

Claughton Scott K.C. replied on the new cases.

Cur. adv. vult.

March 2. The following judgments were delivered.

POLLOCK M.R. This is an appeal from a judgment of Roche J. given on December 8 on a special case stated by Mr. Leck K.C., the umpire in an arbitration. The claim is by shipowners for demurrage under a charterparty dated

(1) [1918] A. C. 119, 128.
(2) 3 Bos. & P. 295n.
(3) 2 Com. Cas. 50.
(4) [1903] 1 K. B. 262.
(5) [1920] 1 K. B. 614.
(6) 26 Com. Cas. 289.
(7) 15 Com. Cas. 101, 108.
(8) 25 Com. Cas. 212, 217.
(9) [1905] A. C. 93.
(10) 23 S. L. R. 342; 13 R. 524.
(11) 10 Times L. R. 633; 7 Asp. M. L. C. 503.

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October 16, 1921, by which the Italian tank steamer *Dora* belonging to the Cantiere Navale Triestina was chartered to the respondents. The umpire held the respondents liable for demurrage for 24 days 9 hours, or in terms of money for 3168*l.* 15*s.*, subject to the question for the opinion of the Court as to the true construction of the charterparty in relation to the facts stated by the umpire. Roche J. held that the respondents were not liable to pay the above sum to the appellants, but were only liable for 411*l.* 13*s.* 4*d.* The owners appeal from that decision, claiming that the award in their favour for 3168*l.* 15*s.* shall stand, and the charterers cross-appeal, claiming that they are not liable for any sum for demurrage.

It is important to refer to certain clauses of the charterparty and to give a short summary of the relevant facts stated in the special case.

Of the charterparty I am going to read one or two clauses. Clause 5 is as follows :—

"Two hundred and sixteen running hours (Sundays and holidays excepted) weather permitting shall be allowed the charterers for loading and discharging, the charterers having the right of loading and discharging during the night, paying all extra expenses."

"(7.) The laying days shall commence from the time the steamer is ready to receive or discharge her cargo, the captain giving six hours' notice to the charterers' agents, berth or no berth."

Clause 8 provides that demurrage shall be payable at the rate of 130*l.* per running day. Clause 9 contains exceptions of the act of God, perils of the sea, arrest and restraint of princes, rulers and people.

The award finds certain facts. The vessel was chartered while she was at Rouen, and she was to proceed to Batoum and load a cargo of oil. She went to Batoum and arrived in Batoum Roads early in the morning of Sunday, November 5.

About 8 A.M. on the same day the sanitary medical officer came on board and she got free pratique. About two hours later the maritime police came on board, closed and sealed

the vessel's wireless and informed the master that all communication with the shore was prohibited. This prohibition continued until 5 P.M. on the next day, November 6, when the chief of the local maritime authorities came on board and informed the master that the prohibition was raised and that the master and crew were free to go on shore.

The master did not go ashore that day. There was a letter sent to the agents of the Naphtha Export informing them of the arrival of the *Dora*. November 7 was a general holiday. On November 8 the master went ashore and at 8 A.M. that day gave notice to the charterers' agents of the arrival of the *Dora* and that she was ready to load, and the agents accepted the notice and said that they would load the *Dora* first turn after the oil steamer *Ramella*, a British steamer expected to finish loading that evening or the following morning. At Batoum petroleum is loaded in a special part of the port called Petroleum Harbour. When the master gave the agents notice on this day the *Dora* was ready to load and ready to enter Petroleum Harbour as soon as the charterers had a berth for her. The lay hours under the charterparty began to run from 2 P.M. on November 8. That is to say the umpire found that this notice, which was given at 8 A.M. on November 8, was a notice of readiness, and that in accordance with cl. 7 the laying days commenced at the expiration of the six hours' notice from 8 A.M. on November 8 and so the lay hours began to run as from 2 P.M. on November 8. [His Lordship read paras. 6, 7 and 8 of the case and continued:] The learned umpire found that the laying time ran continuously from 2 P.M. on November 8 to 8 A.M. on December 5, when the loading was completed, and that none of the exceptions applied to excuse the charterers from liability for the delays caused by the acts of the Russian Government. On this basis the charterers were liable for 24 days 9 hours' demurrage or a sum of 3168*l.* 15*s.*

The question therefore is whether the umpire was correct in his view that the lay days began on November 8 and ran continuously, and that none of the exceptions applied to excuse the charterers from liability. In my judgment, and

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subject to what I am going to say hereafter, that view is correct.

The contract contained in the charterparty is absolute. It contains the phrase: "The laying days shall commence from the time the steamer is ready to receive or discharge her cargo . . . . berth or no berth." Hence the vicissitudes which are incurred are prima facie deemed to be at the risk of the charterers. Mr. Raeburn cited three cases which establish that proposition, if cases are needed to establish such a principle: *Thiis* v. *Byers* (1); *Budgett & Co.* v. *Binnington & Co.* (2); and *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa.* (3) The rule as to liability generally is stated in the last named case by Lord Finlay as follows (4): "If the charterer has agreed to load or unload within a fixed period of time . . . . he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible." And Lord Shaw, quoting a passage from Lord Selborne's judgment in *Postlethwaite* v. *Freeland* (5), says (6): "If, by the terms of the charterparty, he [the charterer] has agreed to discharge it within a fixed period of time, that is an absolute and unconditional engagement, for the non-performance of which he is answerable, whatever may be the nature of the impediments which prevent him from performing it, and which cause the ship to be detained in his service beyond the time stipulated."

It is clear that the onus lies on the charterer to get rid of that liability which could have been provided for in the exceptions. Roche J. held that the words which are found in the well-known book by Scrutton L.J. on Charterparties and Bills of Lading, 11th ed., art. 129, p. 342, can be used here to excuse the charterers in respect of the period of time during which the vessel was away from Batoum and was at

(1) 1 Q. B. D. 244.
(2) [1891] 1 K. B. 35.
(3) [1920] A. C. 88.
(4) [1920] A. C. 88, 94.
(5) (1880) 5 App. Cas. 599, 608.
(6) [1920] A. C. 88, 97, 98.

Constantinople. The words in the textbook are: "If the ship has to be removed from the port, or becomes unfit for loading or discharging, e.g. by reason of a collision, the period of such removal or unfitness will be cut out from the period of demurrage." And for that proposition *Tyne and Blyth Shipping Co.* v. *Leech* (1) is cited. It is not suggested that that case is a decision to that effect. What is pointed out is that in that case a demand was not made for demurrage during days on which the vessel was absent from the port of loading, that absence being due to a collision which she had suffered; and, as I understand it, it is said that because that attitude was adopted in that case by acquiescence between the parties, you may infer some authority for the proposition that where the absence of the vessel during part of the lay days has occurred through some extraneous cause demurrage ought not to be charged as against the charterer. Roche J. in his judgment, referring to that case, says of it: "The second observation that I desire to make is that the authority cited for that proposition—namely, *Tyne and Blyth Shipping Co.* v. *Leech* (1) is a decision on some other matter, and that so far as the proposition laid down in the textbook is founded on the case, it is founded on the fact that counsel for the shipowners did not venture or care to claim demurrage in respect of a period in which the vessel was absent from the port. Therefore I think the proposition must stand or fall on its own merits. In my opinion the proposition is sound." Roche J. invites acceptance of the proposition on the ground that it rests on its own merits. Personally, without some definite authority binding on this Court, I could not accept so wide a proposition; a proposition for which, so far as I can discover, there is in fact no actual authority, and which appears to me to run counter to the general rule of law laid down by the House of Lords in *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa.* (2) It appears to me therefore that the judgment of Roche J., which is based on the acceptance of that proposition, cannot stand.

(1) [1900] 2 Q. B. 12.

(2) [1920] A. C. 88.

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But Mr. Claughton Scott submits that apart from that ground, on which Roche J. gave his judgment, the charterers are excused from liability on several other grounds. First, he said that the vessel was not in fact a ready ship. That is to say, although she had arrived at Batoum and had given notice that she was ready to load, a notice which at the expiration of six hours gave rise to a corresponding liability, that having regard to the difficulties which began at or about 2 o'clock on November 8 it cannot be said that the *Dora* was a ready ship. Now we have to take the facts as found by the umpire. He has intended to find that the lay hours under the charter-party began to run from 2 P.M. on November 8. In effect that means that he held the vessel was a ready ship at 8 A.M. on that day, and it appears to me that we are bound by that finding. If it is a matter of opinion, as may be contended, from the statement made by the umpire in para. 16: "I am of opinion that the lay hours commenced at 2 P.M. on November 8," then I think that in law the umpire was right, and it appears to me that the position of the *Dora* is, if not governed by, well illustrated by *Armement Adolf Deppe* v. *John Robinson & Co.* (1) In that case it was held that the lay days commenced to run when the ship reached the port of discharge, although not at her discharging berth, she being ready in the sense that she could be immediately made ready as soon as she could go alongside her discharging berth. Having regard to the findings in the award and the law applicable to these findings, it appears to me that the umpire was right in holding that the lay hours began as from 2 P.M. on November 8.

The next point is that the exceptions clause, "Act of God, restraint of princes," etc., applies mutually for the benefit of shipowners and charterers, and that inasmuch as what prevented the *Dora* from loading was a restraint of rulers and people, the charterers are entitled to rely on that clause. In support of that argument our attention has been called to *Barrie* v. *Peruvian Corporation* (2), a

(1) [1917] 2 K. B. 204. (2) 2 Com. Cas. 50.

decision of Mathew J., and to *In re Newman & Dale Steamship Co. and British and South American Steamship Co.* (1), where Bigham J. reluctantly followed the decision of Mathew J. Now with regard to these two cases it is plain that the exceptions clause in each case was a very special one, and not one in what might be called the more ordinary form, and I cannot apply the reasoning of these cases to establish the proposition that cl. 9 of the present charterparty is a mutual clause. Another case referred to was *Aktieselskabet General Gordon* v. *Cape Copper Co.* (2) The headnote of that case runs: "In deciding whether a particular provision in an exceptions clause in a charterparty applies in favour of both shipowner and charterer, or applies only in favour of one or other party to the exclusion of the other, regard must be had to the exact wording of the clause in question and to the construction of the charterparty as a whole; and no assistance can be obtained from the decisions of other cases unless the circumstances in those other cases were substantially identical." Now that decision is binding on us, and it appears to lay down, if it was necessary to lay down, the rule that in all these cases one must look at the particular clause which has to be construed, and that little assistance is to be found from other clauses which may have been construed otherwise. I come back, therefore, to look at this clause itself. I do not think, as I have said, that it is covered by, or that any assistance is to be derived from, *Barrie* v. *Peruvian Corporation* (3) or *In re Newman & Dale Steamship Co. and British and South American Steamship Co.* (1); and looking at the clause itself I come to the conclusion that it enured for the benefit of the shipowners only, and not for the benefit of the charterers. In my opinion therefore the charterers are not excused by virtue of the exceptions in cl. 9.

Mr. Claughton Scott then contended that in this case both parties were really prevented by vis major, so that neither party could complete the contract; that the action

(1) [1903] 1 K. B. 262. (2) 26 Com. Cas. 289.
(3) 2 Com. Cas. 50.

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of the Russian Government in sending the vessel away from Batoum was such an overriding act as to render the liability of the charterers far different from what it was ever intended to be, either by the express terms of the charterparty or by the terms which must be implied. For that proposition he quoted *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn*. (2) *Ford* v. *Cotesworth* (1) was a case in which there was a difficulty in the vessel completing the unloading of her cargo at Callao in consequence of the threatened bombardment by the Spanish fleet of the port of Callao. It is important to observe that in that case there was no positive undertaking to load or discharge cargo in a given number of days, and the doctrine of vis major to excuse delay is expressly stated by Martin B. to be applicable for that reason. It is clear from his language that he does not intend to alter the general rule of liability as I have stated it. He says (3): "In this case there is only an implied contract on the part of the defendants; for there is no positive contract whatever on their part." In *Cunningham* v. *Dunn* (2), which follows *Ford* v. *Cotesworth* (1), there is again no absolute contract, and the basis of the decision appears to have been that both parties were conscious of the fact that the vessel, if she took on board as deadweight munitions of war, would have a difficulty, which would possibly be an insuperable one, in entering a Spanish port. That knowledge being knowledge on the part of both parties to the contract it was possible to imply a term in the contract under which there should be no liability if this difficulty became fatal to the enterprise. In effect the two cases amount to this, that where both parties are prevented by vis major so that neither party is ready to perform his contract, then neither party can sue the other, provided that the case is one in which there is no absolute contract on the part of the charterer and the term which has to be considered is one of implication only.

There are two older cases, *Barker* v. *Hodgson* (4) and

(1) L. R. 5 Q. B. 544.
(2) 3 C. P. D. 443.
(3) L. R. 5 Q. B. 548.
(4) 3 M. & S. 267.

Blight v. *Page* (1), in both of which the charterer who had entered into an absolute contract was held to be liable. Lord Ellenborough C.J. says in *Barker* v. *Hodgson* (2): "Is not the freighter the adventurer, who chalks out the voyage, and is to furnish at all events the subject matter out of which freight is to accrue? The question here is, on which side the burthen is to fall." And he comes to the conclusion that as the contract which had been entered into by the charterer was one in which no relief was given by the exceptions, on him rested the liability for the delay. I cannot find in the application of the doctrine of vis major in *Ford* v. *Cotesworth* (3) or *Cunningham* v. *Dunn* (4) that there is a general rule which would excuse the charterer in what after all is a vicissitude or difficulty not unlikely to occur at a Russian port and one which might have been foreseen. For both during the war and since the war difficulties arising from port prohibitions have not been uncommon.

Next it is said by Mr. Claughton Scott that the contract became illegal, and that the illegality prevented the charterers from carrying out their duty under the terms of the charter-party. But it is necessary to consider the nature of the acts which are claimed to constitute the illegality, for it is not every apparent illegality which is to be treated as such. On the findings and statements of fact in the award it appears that there was a somewhat uncertain attempt to put in force a port regulation against Italian ships. It appears to me that the difficulty which arose at Batoum is one to which it was not possible immediately to attribute any characteristic, and certainly not the necessary characteristic of an illegality, and having regard to the authorities and applying the sort of tests that ought to be applied, the charterers cannot in my opinion claim that this port regulation or prohibition made the contract illegal or frustrated it, or made it illegal for them to continue their contract in the sense that they were discharged from their obligation.

(1) 3 Bos. & P. 295n.
(2) 3 M. & S. 270.
(3) L. R. 5 Q. B. 544.
(4) 3 C. P. D. 443.

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In *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1), which was relied on by Mr. Claughton Scott, it was held that a regulation of the Spanish Government, which provided that no freight should be paid at a rate in excess of 875 pesetas per ton, applied and made it impossible and illegal to carry out the terms of the contract as entered into. In my judgment that case does not govern the present case. It does not alter the clear and definite liability of the charterers under such a charterparty as this, which contains a fixed time for loading and discharging, berth or no berth, and imposes a liability to pay demurrage if the lay hours are exceeded in a manner not excused by other conditions or exceptions of the contract. The statement to which I have referred in *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (2) remains authoritative; and when I have considered the various grounds put forward on behalf of the charterers, I do not find any which excuses them from their liability under the present charter to pay when they have failed to load within the time limited by the lay hours. Roche J.'s judgment must be set aside and the appeal allowed, and judgment entered for the appellants for 3168*l.* 15*s.* and costs.

ATKIN L.J. This is a claim for demurrage brought by the owners of an Italian ship against the defendant company on a charter by which the defendants chartered the ship to proceed to Batoum and there load a cargo of oil. The charter was a fixed time charter and provided for a rate of demurrage with no restriction upon the time during which the rate of demurrage was payable. The defendants were found by the umpire to be an independent entity—that is to say, independent of the Russian Government, though it is plain that they were very closely associated with that Government, and are found by the award to be in fact controlled by it. But for the purpose of this case we have to treat the matter as if the defendants were an ordinary commercial company.

(1) [1920] 2 K. B. 287. (2) [1920] A. C. 88.

The first question arises by reason of the vessel being absent from the port of Batoum for the period from November 8 until November 25; and it is said that the absence of the vessel during the period prevented the lay days from running and from expiring in that period. I think so far as this matter is concerned it must be taken on the facts, as found by the umpire, that notice of readiness had been given under the charterparty on the morning of November 8, and in fact the lay days had begun to run somewhere about 2 o'clock on that date. Therefore for the purpose of this case we are considering a period in which the lay days had begun to run but had not expired before the ship absented herself from the port. She absented herself from the port because she was constrained to do so by a display of force on the part of the executive authority at the port of Batoum, and we have to consider the defence that is raised as to the illegality arising from the circumstances under which she was compelled to leave.

But the first point is a simple one and quite independent of illegality. Roche J. says this in substance. If a ship arrives at her port of loading and gives her notice of readiness to load so that the lay days begin to run, and then absents herself from the port, the lay days no longer run, because it is a condition of their running that the ship should remain in the port, not of course that she should be at the berth and in fact loading, but that she should in fact be at the port. Now that is a very simple proposition, and the question is whether it is in accordance with the law relating to shipping transactions. It appears to me that there is no authority for the proposition, and it is contrary to the law which has been established for a great number of years and has the authority of the House of Lords. Roche J. bases himself upon a statement in a textbook of which certainly I should be the last person to deny the authority, Scrutton on Charterparties and Bills of Lading, 11th ed., art. 129, p. 342, where it is stated that "If the ship has to be removed from the port, or becomes unfit for loading or discharging e.g. by reason of a collision, the period of such removal or

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unfitness will be cut out from the period of demurrage." As authority for that proposition *Tyne and Blyth Shipping Co.* v. *Leech* (1) is cited. The proposition made its appearance for the first time in the textbook after the decision of that case. With the greatest respect for the learned editors I think that case is no authority at all for the proposition for which it is cited. In that case a ship called the *City of Newcastle* had been chartered to load a cargo of ore at Poti on a charter which provided that the cargo was to be loaded in ten running days, Sundays and holidays excepted, and discharged at a fixed date and that demurrage should be paid at a certain rate for time occupied above the specified number of days. The vessel arrived on February 11, 1899, when the lay days began to count, and the ten running days for loading expired on February 24, but at that date no quay berth was available. On March 4, while she was lying at anchor in Poti Roads still waiting for a berth, another vessel collided with and damaged her, and on March 7 she proceeded to Constantinople for repair. If she had remained she would have got a berth by March 8 and completed her loading by March 16. On April 19 she again arrived at Poti, but had lost her turn through going to Constantinople. She did not get a quay berth until June 2, and loading was completed on June 10. The plaintiffs claimed demurrage from February 24 to March 4 and from April 19 to June 10, a period of 52 days, but not for the period when the *City of Newcastle* was incapacitated by reason of the collision. The defendants admitted liability for the demurrage they would have been liable to pay on the supposition that she would have got a berth on March 8. Kennedy J. held that the plaintiffs were entitled to recover. He held that when she returned to Poti she again went on demurrage. He said (2): "I think that, although no claim has been made on either side in respect of the period during which the vessel was away at Constantinople, the period of demurrage was resumed, without any break in the continuity of the obligation, when she got back to Poti, and that it lasted for the time claimed

(1) [1900] 2 Q. B. 12, 16. (2) Ibid. 17.

for in this action." So far from that case being an authority for the proposition that the absence of the ship from the port prevents demurrage from being claimed, it appears to me to be a direct authority that in some cases at any rate the absence of the ship does not prevent demurrage from being claimed. The judge quotes the quite familiar instance of a ship being driven to sea by stress of weather, being obliged to leave the port and to return there again. In these circumstances in a charter with a fixed time for loading I should have thought there could be no doubt at all that demurrage was payable on the principle, for which there is ample authority, that in such a charter there is an absolute obligation on the charterer to load the vessel within the time that is stipulated for loading her, and that he is not excused from doing that by any cause unless it is one for which he has stipulated in a properly drawn exception, or unless the failure to load arises by reason of the shipowners' default. It really is hardly necessary to cite authority for that proposition, but there is a very recent authority in the House of Lords bearing on the matter, *William Alexander & Sons* v. *Aktieselskabet Dampskibet Hansa* (1), which was an appeal from a decision of the Court of Session in Scotland. There a vessel was chartered to proceed to Archangel and load a cargo of timber and thereafter to proceed with the cargo to Ayr. The charterparty provided that the cargo was to be loaded and discharged at the rate of not less than 100 standards per day, whether berth available or not, "always provided the steamer can load and discharge at this rate," and that, in the event of the steamer being detained beyond the time stipulated as above for loading and discharging, demurrage should be paid at 70*l.* per day and pro rata for any part thereof. The ship duly arrived at Ayr, and if the discharge had been carried out at the stipulated rate it would have been completed in six and one-third days, but owing to a shortage of labour at the port it occupied thirteen and one-third days. The shipowner claimed seven days' demurrage. Viscount Finlay said (2): "On this appeal a great many cases were cited laying down

(1) [1920] A. C. 88. (2) [1920] A. C. 94.

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the rule that if the charterer has agreed to load or unload within a fixed period of time (as is the case here, for certum est quod certum reddi potest), he is answerable for the non-performance of that engagement, whatever the nature of the impediments, unless they are covered by exceptions in the charterparty or arise through the fault of the shipowner or those for whom he is responsible. I am here adopting in substance the language used by Lord Justice Scrutton in his work upon Charterparties and Bills of Lading, art. 131. Of the authorities I will mention only *Budgett & Co.* v. *Binnington & Co.* (1), and I refer specially to the judgment in that case given by Lord Esher. Although no authority upon the point was cited which would in itself be binding upon your Lordships' House, there has been such a stream of authority to the same effect that I think it would be eminently undesirable to depart in a matter of business of this kind from the rule which has been so long applied, even if your Lordships felt any doubt as to the propriety of these decisions in the first instance. I myself have no doubt as to their correctness, and I understand that this is the opinion of all your Lordships."

Therefore it appears to me that unless the defendants can show that the absence of the ship arose from a default of the shipowners—and that they clearly have not done—or unless they show that the absence of the ship is covered by an exception in the charterparty—and I think they have failed to do that also—then they are liable in this case, unless they can succeed upon the further ground of illegality, which is not mentioned in the case in the House of Lords because it did not arise there. Perhaps I may put the matter in another way. It is said that the time should not run while the vessel was away from the port, because during that time obviously the vessel was not ready and willing to load. That appears to be disposed of by the authority of *Budgett & Co.* v. *Binnington & Co.* (1), which indicates that it is not an implied condition of the right of a shipowner to demurrage in these circumstances that the ship should be ready and willing to

(1) [1891] 1 Q. B. 35.

load. The express point is dealt with by Lindley L.J. in that case. (1) He there said (2): "This stipulation is in terms unconditional, and it has frequently been called an absolute contract, by which I understand an unconditional contract. What we have to consider is whether there is any implied condition attached to this contract. It is argued that there is such a condition, and that it may be expressed by saying that the shipowner shall be able and willing to do his part in the unloading, and that, if he is not so able and willing, the freighter is relieved from the consequences of a breach on his part. Such a statement is far too wide; for, if it were true the cases of *Thiis* v. *Byers* (3); *Porteus* v. *Watney* (4); and *Straker* v. *Kidd* (5), would have been improperly decided. I agree that there is an implied term in the contract, and that is, that the shipowner shall not prevent the freighter from performing his part of the contract; and if it is shewn that this has happened, the freighter is discharged." Indeed, if one comes to think of it, there can be no reason why the absence of the ship from the harbour, once the lay days have begun to run, without any fault on the part of the owner, should prevent the lay days from continuing to run and the ship going on demurrage. A ship may be prevented from loading by causes quite outside the will of either the shipowner or the charterer and yet the charterer is liable for demurrage. It appears to me to make no difference whether the vessel is in harbour fifty yards away from a berth and cannot get to it or whether she is fifty miles away. In either case the charterer has undertaken to load and is liable for the delay, because he has entered into a contract to load the ship within a certain time, and if he does not do so he pays a fixed sum for the delay. In these circumstances I am quite unable to agree with the judge in the view that he took as to the effect of the absence of the ship from the port.

But that compels us to decide another point, and that

(1) [1891] 1 Q. B. 35.
(2) Ibid. 40.
(3) 1 Q. B. D. 244.
(4) (1878) 3 Q. B. D. 227, 534.
(5) (1878) 3 Q. B. D. 223.

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is the question of illegality. It is said on behalf of the charterers that the reason why the vessel went away from the port was that in fact it was illegal for her to take on board a cargo at all, and that it was illegal also for her to remain in the harbour. It is said further that this illegality operated from a period before she arrived at the port; that it operated when she arrived, so as to prevent her from being an arrived ship, and also prevented her from being ready to load, and also prevented her, at any rate for the period during which she was absent, from being able to say that there was a valid contract running obliging the charterer to load; so that according to this contention the lay days would not expire while she was absent. Roche J. has not decided this point, as he deemed it unnecessary to do so for the purposes of his decision.

It appears to me that the learned judge cannot have accepted the full argument of the defendants in this respect, because there is no doubt that if in fact there is illegality a plea based on such illegality is not confined to the period of the ship's absence from the port; and indeed the strongest way of putting the case for the charterers is to say that the illegality operated so as to prevent the lay days from ever running. That is the matter that we have to consider. The point as to illegality is really based on the decision of the Court of Appeal in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1), which is a rather famous case, because it related to perhaps the largest freight reported to have been earned during the war. It was there said that by Spanish law it was illegal to pay more than a certain rate of freight. But as far as I can see no one ever suggested that the effect of the illegality in that case was to destroy the contract or to invoke the doctrine of frustration. It was merely a defence to an action on that portion of the contract providing for payment of freight in excess of that rate. Scrutton L.J. said (2): "I should prefer to state the ground of my decision more broadly and to rest it on the ground that where a contract requires an act to be done in a foreign country, it is, in the

(1) [1920] 2 K. B. 287. (2) Ibid. 304.

absence of very special circumstances, an implied term of the continuing validity of such a provision that the act to be done in the foreign country shall not be illegal by the law of that country."

It is said that in the circumstances of the present case it was illegal for the charterers to load, or for the shipowners to take on board the cargo, at the time when the vessel arrived; and that the contract was subject to the implied term that it should continue valid. In the view I take of this case the question does not arise, because to my mind, whatever be the bearing of the doctrine of illegality upon a contract to load and to pay demurrage, there must in the first place be proof of the illegality, and I think in this case nothing has been proved that could be considered as making the contract illegal within the meaning of the rule. Illegality by foreign law is a question of fact, and we must take the facts as found by the learned umpire. The facts he has found are these. There appears to have been about the time of the *Dora's* arrival at Batoum some temporary diplomatic friction between Russia and Italy, and a communication emanated from the executive department of the Russian Government at Moscow addressed to the Soviet authorities at Batoum that in view of the aggressive policy of the Italian Government they were to stop the admittance of Italian steamers to the port and suspend generally any relations with Italy. That appears to me to be merely executive action on the part of the executive authorities, and it certainly produced no very certain results as far as the executive authorities at Batoum were concerned. There is no doubt that when the vessel first arrived she was told there were difficulties; she was not to communicate with the shore and she must go away. The master remonstrated, and said he must get the vessel's health certificate. Thereupon he was allowed opportunities of getting the health certificate. He was allowed to wait for a certain time, and then he was told that the order to leave Batoum was withdrawn and that there would be no further difficulty. He went on shore on November 8, and gave notice of readiness

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to load to the charterers' agents, which notice the charterers' agents accepted, and said they would load the *Dora* as soon as they had finished loading another steamer then at the berth. The notice of readiness expired about 2 P.M. on that particular day, and almost immediately afterwards the executive authorities again began to assert themselves, but again with somewhat uncertain effect. Eventually military force arrived, and the ship was told to go. The total result of the facts so found appears to me merely to indicate that here was action of the executive authority, which was uncertain, somewhat capricious, and temporary in its character, but which was very far removed from such illegality as, it is said, ought to be assumed to be the subject of an implied term by the parties at the inception of the contract of charter-party. It is precisely the kind of conduct which is ordinarily covered by what is known as the exception of restraint of princes. I do not say that the exception of restraint of princes may not operate because the contract becomes illegal according to the law of the port, but it certainly is not conterminous with illegality, and in this case I find no evidence of illegality at all. In these circumstances it seems to me unnecessary to consider the further questions that would arise if the contract had been illegal. Therefore I do not decide the point. I desire to reserve the question as to what would be the effect, on a contract to load in a certain time, of a temporary illegality in operation when the ship first arrived, or which commenced to operate after the lay days had begun to run, each of which questions may give rise to difficult considerations of law.

I agree with the Master of the Rolls that it is unnecessary to consider the cases of *Ford* v. *Cotesworth* (1) and *Cunningham* v. *Dunn*. (2) *Cunningham* v. *Dunn* (2) seems to have been misunderstood. In that case the claim was not by a shipowner against a charterer in respect of an absolute obligation by the charterer to load a ship, but by a charterer against the ship for not staying to be loaded in a case where there was a permanent illegality preventing the

(1) L. R. 5 Q. B. 544. (2) 3 C. P. D. 443.

charterer from putting the chartered cargo on board the chartered ship, and when it could be proved that if the ship had stayed the charterer would not have been able to put a single ton of cargo on board. How any plaintiff could recover in those circumstances I am quite unable to understand.

That brings me to the third point argued (which the judge found it unnecessary to decide, although he expressed an opinion with regard to it in favour of the shipowners)—namely, that the exceptions clause was a mutual one, and that therefore the exception of restraint of princes relieved the charterers from being under an obligation to load the ship. That question turns on the construction of the charterparty, and there are only two clauses to which I need refer on that matter. [His Lordship read clauses 8 and 9 of the charterparty and continued:] The question arises whether the exceptions in cl. 9 are inserted only in favour of the shipowners or whether they avail for the benefit of the charterers. There is no general rule on the subject; each charter has to be considered on its merits, and it is a question of construction, looking at the charterparty as a whole, whether or not the exceptions operate in favour of the charterer as well as the shipowner. The best decision I have found on the point is in *Aktieselskabet General Gordon* v. *Cape Copper Co.* (1) In that case it was held that the exceptions clause, which very closely corresponded with the exceptions clause in this case, did not operate in favour of the charterers. Scrutton L.J. said (2): "The question in this case is one which ever since I was at the Bar has been argued with considerable heat by counsel concerned in it—whether or not certain provisions in the charterparty avail for the protection of the charterer or only for the protection of the shipowner. In my view it is quite impossible to lay down any general rule which will enable that question to be answered. Charterparties vary infinitely in their terms. In view of the history of the matter you cannot answer the question without a careful study of the terms of the particular charterparty concerned: and a decision on that particular charterparty will only govern

(1) 26 Com. Cas. 289. (2) Ibid. 298.

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charterparties in a very similar form." I think that is the right view, and in my opinion it would be most unfortunate if the Court were to lay down any general rule on a matter which is after all a pure question of construction. Prima facie exceptions are put in a charterparty for the benefit of the shipowner.

Looking at the contract in the present case it appears to me that the general exceptions are so drawn that they can be more reasonably applied to the shipowners' liability than to the charterers' liability. It seems to me, construing this contract as a whole, that the exceptions are not mutual and that the charterers are only excused for time lost if they come within the express causes mentioned in cl. 8. That clause did not apply in the present case. Therefore they are not excused. The result is that the umpire was right in awarding the shipowners the full amount of demurrage claimed, and the appeal must be allowed with costs.

SARGANT L.J. I agree. The award involves a finding of fact, that the lay days or hours began at 2 P.M. on November 8. The ship is found in para. 5 to be an arrived ship—i.e., ready to load at 8 A.M. on November 8, when notice to that effect was given to the charterers. The lay days or hours would therefore begin six hours later—namely, at 2 P.M.—and the award contains a definite statement to that effect at the end of para. 5. That being so, the finding that from 2 P.M. till 11.30 P.M. there were uncertain and contradictory orders given by the authorities does not, in my judgment, negative the definite previous finding that the lay hours began at 2 P.M.

The events which subsequently happened certainly did not amount to a frustration of the enterprise or a putting an end to the contract of affreightment, and the only question left is, in the words of Lindley L.J. in *Budgett & Co.* v. *Binnington & Co.* (1), on whom does the risk fall? It must be observed in the first place that there is here an absolute or unconditional contract by the charterers to load and unload within a

(1) [1891] 1 Q. B. 35.

definite number of hours—216 running hours or 9 days—and failure to comply with this absolute contract prima facie makes the contracting party liable for the resulting loss, unless there is in the charterparty some qualification of this absolute contract. The mere absence of the vessel from the port during the lay days does not I think exclude this absolute contract. The only relevant qualification must be one embodied in the general exceptions clause.

Now as to this clause two questions arise, first, whether the cause of the delay is within the exception in cl. 9, and, secondly, whether this clause applies here in favour of the charterers. As to the first question, I think that the delay was due to "restraint of princes, rulers, and people" within the terms of cl. 9—the general exceptions clause—and this position was accepted by Mr. Raeburn, and it is to be remarked that such a restraint necessarily in many cases involves any one resisting it in an illegality. I cannot see that any illegality is shown in this case otherwise than such as would have been involved in a resistance to the executive. But on the other hand I am of opinion that cl. 9 is not a clause in favour of the charterers, so far at any rate as a claim for demurrage is concerned. The latter portion of cl. 9 applies in terms to the ship only, and there are indications in the concluding words of the earlier part of the clause that its exceptions are also in favour of the owners only. There are also other clauses in the contract excusing charterers (particularly as to claims for demurrage) which cover some of the same ground in cl. 9 and are more particular in their operation: see especially cl. 8 and also clauses 14 and 15.

Appeal allowed and cross-appeal dismissed.

Solicitors for shipowners: *Thomas Cooper & Co.*
Solicitors for charterers: *Wynne-Baxter & Keeble.*

W. I. C.

1925
March 11.

SIMPSON *v.* TATE.

Revenue—Income Tax—Office of Profit—Salary—Deductions—Money wholly, exclusively and necessarily expended in the Performance of the Duties of the Office—Medical Officer of Health—Subscriptions to Medical Societies—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. E, r.* 9.

The medical officer of health for a county joined certain medical and scientific societies in order that by means of their meetings and published transactions he might be aware of all recent advances in sanitary science and keep himself up to date on all medical questions affecting public health. From the amount at which the emoluments of his office were assessed to income tax under the Income Tax Act, 1918, Sch. E, he claimed to deduct, under r. 9 of that Schedule, the subscriptions paid by him to these societies as being money which he was obliged to expend "wholly, exclusively and necessarily in the performance of the . . . . duties" of his office:—

Held, that the subscriptions were not money which he was obliged so to expend and that they could not be deducted.

From the amount at which the emoluments of an office or employment of profit are assessed to income tax under the Income Tax Act, 1918, Sch. E, the holder of the office is not entitled to deduct, under r. 9 of that Schedule, any money which he has expended for the purpose only of enabling him to continue qualified for performing the duties of the office or employment: per Rowlatt J.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

During the year ending April 5, 1924, as at other times, the respondent was medical officer to the Middlesex County Council. In that year he was a fellow of, and paid subscriptions to various societies, the particulars of which are set out below. The respondent was assessed to income tax for the said year under the Income Tax Act, 1918, Sch. E, on the sum of 1337*l.* in respect of his salary as medical officer. He appealed against the assessment to the said Commissioners, claiming that the sum to which the subscriptions paid by him to the said societies in that year in all amounted, namely, 8*l.* 6*s.* 6*d.*, should be deducted from his salary in order to arrive at his liability to tax.

On April 23, 1924, the appeal was heard by the said Commissioners. The respondent proved that he joined the Royal Society of Medicine in order to have the benefit of the meetings of its epidemiological branch and to obtain the transactions published by that branch, which transactions

included the results of research work; that that society included a section dealing with infectious diseases, a subject of the greatest importance to county medical officers; that the Society of Medical Officers of Health, of which he had been a member for many years, published a journal dealing with public health matters and took an active interest in questions affecting the status and salaries of public health officers; that he became a fellow of the Royal Institute of Public Health in order to get their journal, which dealt with matters relating to public health; that he became a member of the Association of County Medical Officers of Health to enable him to ascertain how similar work was carried on throughout England; that the knowledge obtained by the respondent, as a member of the last mentioned association, enabled him to ascertain how county medical officers in other districts were dealing with problems similar to those with which he had to deal; that membership of all these societies was voluntary on his part, and was not required as a condition of his appointment, but that it was customary for county medical officers to be members of these societies; that in order to carry out efficiently his duties as a county medical officer it was necessary for him to be aware of all recent advances in sanitary science, and to keep himself up to date on all medical questions affecting public health, and that without the journals and meetings of these societies he would have had great difficulty in obtaining that knowledge, and in many instances would have been unable to obtain it; and that the knowledge obtained by him through being a member of these societies had enabled him to perform his duties as a county medical officer with increased efficiency.

It was contended by the respondent that the said sum of 8*l.* 6*s.* 6*d.* was money expended wholly, exclusively and necessarily in the performance of his duties as a county medical officer; that the said sum was a proper deduction from the emoluments to be assessed under Sch. E, and that the assessment should be reduced to 1329*l.*

It was contended by the appellant to the contrary of each of these propositions.

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The said Commissioners held that the said sum of 8*l.* 6*s.* 6*d.* was money expended wholly, exclusively and necessarily in the performance of the respondent's duties as a county medical officer, and they reduced his assessment to 1329*l.*

Sir T. Inskip S.-G. and *R. P. Hills* for the appellant. The subscriptions paid by the respondent to the medical and scientific societies to which he belongs ought not to be deducted from the emoluments of his office as county medical officer to be assessed to income tax under the Income Tax Act, 1918, Sch. E. (1) These subscriptions were not money which the respondent was obliged to expend "wholly, exclusively, and necessarily in the performance of the . . . . duties," of his office within the meaning of r. 9 of that Schedule. (1) It appears from the special case that the respondent paid these subscriptions in order that by means of the meetings and journals of the societies he might be aware of all recent advances in sanitary science and keep himself up to date on all medical questions affecting public health, and thereby enabled to carry out efficiently the duties of his office. Thus, the respondent in paying the subscriptions did not expend the money wholly, exclusively, and necessarily in the performance of the duties of his office, but for the

(1) The Income Tax Act, 1918, provides:—

"Schedule E.

"Tax under Schedule E shall be charged in respect of every public office or employment of profit, ... for every twenty shillings of the annual amount thereof.

Rules Applicable to Schedule E.

1. Tax under this Schedule shall be annually charged on every person having or exercising an office or employment of profit mentioned in this Schedule . . . .

6. The tax shall be paid in respect of all the public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described, namely . . . .

(*j*) Offices or employments of profit under any public corporation or local authority, or under any trustees or guardians of any public funds, tolls or duties; . . . .

9. If the holder of an office or employment of profit is necessarily obliged to incur and defray out of the emoluments thereof the expenses of travelling in the performance of the duties of the office or employment, or of keeping and maintaining a horse to enable him to perform the same, or otherwise to expend money wholly, exclusively, and necessarily in the performance of the said duties, there may be deducted from the emoluments to be assessed the expenses so necessarily incurred and defrayed."

antecedent or collateral, though very proper and prudent, purpose of keeping himself fit to continue the performance of these duties with efficiency. In the case of *Ricketts* v. *Colquhoun* (1), it was held that expenses incurred by the recorder of a provincial borough in travelling between London and the borough were not incurred in the performance of the duties of the office and could not be deducted under the Schedule; and in *Bowers* v. *Harding* (2) it was held that the wages of a domestic servant employed in doing household work while her mistress was engaged as teacher of a school were not expenses necessarily incurred by the mistress in the performance of her duties, and could not be deducted; and still less are the subscriptions here in question expenses incurred in the performance of the duties of the respondent's office which can be deducted under the rule. If the respondent be held entitled to deduct these subscriptions, the holder of every office of profit will be entitled to make similar deductions, and, to take one example, the holder of every legal office could deduct the subscriptions paid by him to the publishers of the Law Reports and to legal clubs.

J. H. Stamp for the respondent. The subscriptions paid by the respondent to the various societies ought to be deducted from the emoluments of his office as county medical officer to be assessed to income tax under Sch. E. These subscriptions were money which the respondent was obliged to expend "wholly, exclusively, and necessarily in the performance of the . . . . duties" of his office under r. 9 of that Schedule. The question whether the subscriptions were money of that description was a pure question of fact: *Jardine* v. *Inland Revenue* (3), and the Commissioners have found as a fact that it was. If the question is one of law, then on the true construction of these words of the rule these subscriptions are clearly within it. The respondent's membership of the societies was most intimately associated with his performance of the duties of his office. He could not efficiently perform

(1) [1924] 2 K. B. 347; now affirmed [1925] 1 K. B. 725.

(2) [1891] 1 Q. B. 560.

(3) 1907 S. C. 77; 44 S. L. R. 136; nom. *Jardine* v. *Gillespie*, 5 Tax Cas. 263.

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these duties unless he belonged to these societies. No one but a medical officer of health would belong to all these particular societies. If the respondent were to retire from his present office he would no longer have occasion to subscribe to all these societies. In *Jardine* v. *Inland Revenue* (1) it was held that money spent by the minister of a large parish in keeping a horse and carriage was an expense which he was necessarily obliged to incur to enable him to perform his duties, and might be deducted, and the subscriptions paid by the respondent are even more clearly money necessarily expended in the performance of his duties. The case of *Ricketts* v. *Colquhoun* (2) is distinguishable, because there the travelling expenses incurred by the recorder were not essentially connected with the performance of his duties.

Sir T. Inskip S.-G. in reply. In *Bowers* v. *Harding* (3) the question whether expenses could be deducted from the emoluments of an office was treated as a question not of fact but of law. If the respondent retired from his present office he would continue to belong to all these societies in order that he might remain qualified to take up another appointment of the same kind.

ROWLATT J. In my opinion the decision of the Special Commissioners cannot be supported. If the question is one of fact, I think there is no evidence to support the conclusion at which the Commissioners have arrived. If the question is one of law, I think the Commissioners have not rightly construed the relevant provisions of the Income Tax Act, 1918. Sch. E of the Act provides that income tax shall be charged in respect of every public office or employment of profit, but by r. 9 thereunder money expended wholly, exclusively and necessarily in the performance of the duties of the office may be deducted from the emoluments to be assessed. The office holder is obliged to qualify himself for the office beforehand in order to obtain it, but having obtained it, he is allowed to deduct certain necessary expenses, such as those of

(1) 1907 S. C. 77; 44 S. L. R. 136; nom. *Jardine* v. *Gillespie*, 5 Tax Cas. 263.

(2) [1924] 2 K. B. 347; now affirmed [1925] 1 K. B. 725.

(3) [1891] 1 Q. B. 560.

traversing the scene of his work and of performing his duties. The respondent qualified himself for his office before he was appointed to it, and he has very properly endeavoured to continue qualified by joining certain professional and scientific societies, so that by attending their meetings and procuring their publications he may keep abreast of the highest developments and knowledge of the day. He seeks to deduct from his assessable income the subscriptions paid by him to these societies as money expended necessarily in the performance of the duties of the office. When one looks into the matter closely, however, one sees that these are not moneys expended in the performance of his official duties. He does not incur these expenses in conducting professional inquiries or get the journals in order to read them to the patients. If he did, the case would be altogether different. He incurs these expenses in qualifying himself for continuing to hold his office, just as before being appointed to the office he qualified himself for obtaining it.

I think it is desirable to lay down some principle applicable to cases of this kind. In my view the principle is that the holder of a public office is not entitled under this rule to deduct any expenses which he incurs for the purpose of keeping himself fit for performing the duties of the office, such as subscriptions to professional societies, the cost of professional literature and other outgoings of that sort. If deductions of that kind were allowed in one case every professional office holder would claim to be entitled to deduct the payments made by him to every scientific society to which he happened to belong and the price which he paid for every professional publication, and there would be no end to it. The principle seems to me to be clear that no such deductions as these can be permitted.

Appeal allowed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondents: *Hempsons.*

J. R.

1925
March 12;
April 1.

BARRETT AND ANOTHER *v.* HARDY BROTHERS (ALNWICK), LIMITED.

Landlord and Tenant—Apportionment—Flat rated together with other Floors—Rateable Value of Property exceeding statutory Limit—Jurisdiction of County Court to apportion—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 3.

Sect. 12, sub-s. 3, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, empowers a county court judge to apportion the rateable value of a property, although such value may exceed in amount the limit imposed by sub-s. 2, for the purpose of ascertaining whether a part of the property, which is let as a dwelling-house but is not separately rated, is within the scope of the Act.

APPEAL from Westminster County Court.

By a lease dated August 17, 1917, the defendants let to the plaintiff, Mr. Barrett, a flat on the second floor at 61 Pall Mall for a term of five years from September 29, 1917, at the yearly rent of 185*l.* during the first three years, and 200*l.* during the last two years. By a lease dated October 11, 1922, the defendants let to Mr. Barrett and a Mrs. Evans (as surety) the same flat on a quarterly tenancy from September 29, 1922, at the rent of 53*l.* 15*s.* a quarter. Before August 17, 1917, the second floor had been let as business premises only at an annual rent of 150*l.* The floor had never been separately rated. In August, 1914, the basement and first floor were assessed together at 375*l.* gross and 313*l.* rateable, and the second, third, fourth, and fifth floors together at 240*l.* gross and 200*l.* rateable. Subsequently those floors were assessed together at 240*l.* gross and 200*l.* net, the shop at 650*l.* gross and 592*l.* net, and the basement at 450*l.* gross and 375*l.* net.

The tenants of the flat on the second floor applied to the county court judge to apportion the rateable value of the property. The county court judge made an order declaring that the rateable value of the property on August 3, 1914, should be apportioned as between the applicants' flat and the rest of the property, and apportioned the rateable value of the flat at that date at 60*l.* (1)

The landlords appealed.

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12,

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Topham K.C. and *Claude Grundy* for the appellants. The county court judge had no jurisdiction to make an apportionment. Under s. 12, sub-s. 3, of the Act of 1920, the right to apportion only arises when there is a dwelling-house to which the Act applies. In the present case the property was outside the Act. But even if the county court judge was entitled to make an apportionment of the rateable value, he was wrong in making it as on August 3, 1914. The proper date at which to apportion would have been August 17, 1917, when the flat was first let as a dwelling-house.

[They referred to *Rex* v. *Marylebone County Court Judge* (1); *Woodhead* v. *Putnam* (2); *Williams* v. *Perry* (3); *Sinclair* v. *Powell* (4); *Lelyveld* v. *Peppercorn.* (5)]

G. Beyfus for the respondents. The decisions as to apportionment of rent do not apply to the present case. It is said that the tenants cannot apply for an apportionment of the rateable value of the property, because their flat is rated together with several other floors. But sub-s. 3 of s. 12 was inserted to meet the case where a larger entity is let, and it is necessary to find out what part of the rateable value is attributable to a part of that entity. The subsection cannot be applied at all unless its language is somewhat stretched. The county court judge was bound to hear the applicants' evidence, and then to decide as to the jurisdiction.

Topham K.C. in reply referred to *Joy* v. *Eppner.* (6)

Cur. adv. vult.

1925. April 1. The following written judgments were delivered.

sub-s. 3: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the court as to the amount to be apportioned to the dwelling-house shall be final and conclusive."

(1) [1923] 1 K. B. 365.
(2) [1923] 1 K. B. 252.
(3) [1924] 1 K. B. 936.
(4) [1922] 1 K. B. 393.
(5) [1924] 2 K. B. 638.
(6) [1925] 1 K. B. 362.

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BANKES L.J. This appeal raises the question of what is the proper construction to be placed upon the apportionment section, s. 12, sub-s. 3, of the Rent Restriction Act, 1920. If it had been possible to foresee all the practically endless variety of circumstances and conditions which may and do arise out of agreements between landlords and tenants, it might have been better if the Courts had confined the operation of this sub-section within what are obvious limits, rather than to have attempted to find a construction which, by ignoring the exact language of the Legislature, was thought to give effect to its intention. The result has been that in the attempt to stop obvious holes through which a landlord might escape from the clutches of the statute, a chasm has been opened in which even a house in Pall Mall may be engulfed, and opportunities given to unscrupulous tenants to evade quite legitimate obligations. The sub-section is worded as follows. [The Lord Justice read the sub-section and continued:] Sub-s. 1 is: "Except where the context otherwise requires (*a*) The expression 'standard rent' means the rent at which the dwelling-house was let on the 3rd day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said 3rd day of August, the rent at which it was first let"; and "rateable value" is defined in sub-s. 1 (*c*) as the rateable value on August 3, 1914, "or, in the case of a dwelling-house or a part of dwelling-house first assessed after that date, the rateable value at which it was first assessed." There have been quite a number of reported decisions upon the construction to be placed upon the sub-section. The first in order of date was *Woodward* v. *Samuels*. (1) This was a simple case, as the whole house was within the protection of the statute, and was therefore a dwelling-house to which the Act applied, and the action of the landlord had been merely to let off rooms as separate dwellings, but without any structural alteration. The next case in order of date was *Sinclair* v. *Powell* (2), decided in

(1) (1920) 89 L. J. (K. B.) 689.

(2) [1921] W. N. 206.

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the Divisional Court in May, 1921. In that case the house was not within the protection of the statute, and the Court held that as the building when it was let off in flats was not within any Rent Restriction Act, the landlord was entitled to deal with it as he pleased, and that a tenant of one of the flats under these circumstances was not entitled to ask for an apportionment of rent. That decision was affirmed on appeal. (1) The Court was divided in opinion as to the grounds of their decision. Atkin L.J. and I considered that the house had been so structurally altered that no apportionment of the rent of the original house could be demanded. Scrutton L.J. decided upon the same ground as was taken in the Divisional Court. Looking back now over the decisions that have been given both in Divisional Courts and in the Court of Appeal (to some of which I was a party) since that case was decided, I am inclined to think that it would have been better to have adhered to the view taken by the Divisional Court and by Scrutton L.J., and allowed the Legislature to amend the law so as to stop obvious omissions in it rather than to follow the course of endeavouring to supply the omissions by an interpretation of the sub-section which practically ignores its actual wording. The decisions which have succeeded *Sinclair* v. *Powell* (1) are *Woodhead* v. *Putnam* (2) and *Marchbank* v. *Campbell* (3), both decided in November, 1922; *Rex* v. *Judge of Marylebone County Court* (4), decided in December, 1922; *Sutton* v. *Begley* (5); *Joy* v. *Eppner*. (6) The result of these decisions undoubtedly is, to use Salter J.'s language in *Woodhead* v. *Putnam* (7), that "to entitle a tenant to apportionment under s. 12, sub-s. 3, it is not necessary that the 'property' in which the applicant's dwelling-house is 'comprised' should itself be a dwelling-house, or should be subject to the Act." In other words, a construction of the sub-section has been established which reads "standard rent" in a sense other

(1) [1922] 1 K. B. 393.
(2) [1923] 1 K. B. 252.
(3) [1923] 1 K. B. 245.
(4) [1923] 1 K. B. 365.
(5) [1923] 2 K. B. 694.
(6) [1925] 1 K. B. 362.
(7) [1923] 1 K. B. 252, 256.

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than the sense in which it is defined by the Act, and gives to the expression "dwelling-house to which this Act applies" not the full sense of a dwelling-house, the rent or rateable value of which is within the statutory limit, but merely the sense of being a house or part of a house let as a separate dwelling. As a result of this construction, apportionment is permissible for the purpose of ascertaining whether a house or a part of a house is or is not within the Act, and persons become entitled to claim the protection of the Act under conditions which I cannot think were ever contemplated by the Legislature.

The present case is the first which I have come across in which an application has been made to apportion the rateable value of premises in order to take advantage of the Act. I think that we must follow the line of decisions to which I have referred, and we must ignore the definition of rateable value contained in s. 12, sub-s. 1 (*e*), in the same way as the definition of standard rent has been ignored. The material history of the property is as follows. It is situate in Pall Mall, No. 61. It consists of a basement let separately as a restaurant, shop on ground floor, and five floors above, some used for business and some for residential purposes. The portion of the premises occupied by the respondents is the second floor, which was let to them for residential purposes on a three years' lease at the annual rent of 215*l.* This floor has never been separately rated. The last previous letting was for residential purposes, also by a lease dated August 17, 1917, at the annual rent of 185*l.* Previously to that the floor had been let as business premises only at an annual rent of 150*l.* The position with regard to the assessment of the premises was that in August, 1914, the basement and first floor were assessed together at 375*l.* gross and 313*l.* rateable, and the second, third, fourth and fifth floors were assessed together at 240*l.* gross and 200*l.* rateable. At a later date the second, third, fourth and fifth floors were assessed together at 240*l.* gross and 200*l.* net, the shop at 650*l.* gross and 592*l.* net, and the basement and café, 450*l.* gross and 375*l.* net.

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The county court judge considered that he was bound to accede to the application for apportionment. Upon the authorities I think that he was right. He treated the application as an application to apportion the rateable value as between the four floors which were assessed together. In this I think that he was probably right, and upon his apportionment of the figures the floor occupied by the respondents is brought within the control of the statute. The appeal therefore fails and must be dismissed with costs.

A point was raised before us which was referred to incidentally in the court below, and that is the date at which the apportionment is to take place. The sub-section refers to the material date as the date in relation to which the standard rent is to be fixed. In the present case that date is August, 1917, when this floor was first let as a separate dwelling.

During the argument our attention was called to the recent decision of a Divisional Court in *Lelyveld* v. *Peppercorn*. (1) I do not think the decision in that case can be applied to the present one, and it may be that some day the question of whether that decision is consistent with the earlier decisions will have to be considered.

SCRUTTON L.J. The question in this appeal is whether the county court judge had a right to apportion the rateable value of No. 61 Pall Mall, to ascertain the rateable value of the second floor flat therein on August 3, 1914. The object of this application was no doubt to lead up to a claim for rent overpaid, having regard to the standard rent and statutory increases.

That these premises should be within the Rent Restriction Acts seems at first sight absurd. The rent of this flat has not since March, 1914, been less than 150*l.* per annum, the superior limit for rent restricted houses in London having never been more than 105*l.* It is hoped by apportionment to get a rateable value of less than 105*l.* At present, under the 1920 assessment, the whole building is rated at 1100*l.* gross, 967*l.*

(1) [1924] 2 K. B. 638.

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net, the part which comprises this flat, apparently three floors, being rated at 450*l.* gross, 375*l.* net. The language of the Rent Restriction Acts makes it very difficult to say what the legal position is.

The statutory authority for apportionment is to be found, if at all, in s. 12, sub-s. 3, of the Act of 1920. This begins: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies." As whether a house is within the Act depends on whether its standard rent or rateable value exceeds a certain limit, this section literally read runs round in a useless circle. You cannot know whether the Act applies to the house till you know its standard rent or rateable value. If you have not determined these items, there is no proof that the Act applies to it. It is said that you must read the words as if they said: "Where in order to determine the standard rent or rateable value of any dwelling-house for the purpose of seeing whether this Act applies to it, it is necessary to apportion," etc. The words obviously do not say that in their ordinary meaning. The definitions do not help the matter: "Unless the context otherwise requires 'standard rent' means the rent at which the dwelling-house was let on August 3, 1914, or, where first let after the said 3rd day of August, the rent at which it was first let." In fact on August 3, 1914, the whole of what is now the second floor was not separately let; what was let at 150*l.* a year was "All those two rooms on the second floor, with the use in common with others of the lavatory and w.c. on the half landing." The tenant covenanted not, without the consent in writing of the landlords, to carry on any business "except that of a consulting engineer or similar business, but to use the same as such office only." The lease says nothing about a dwelling-house. The county court judge has found "that it is a dwelling-house"; there was evidence that it was used as a dwelling-house at some time not earlier than July, 1917, and in August, 1917, with a back room it was let as a dwelling-house; but I cannot construe the earlier lease

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except as a tenancy "to use as an office only." As the important matter is the rights under the lease, not the de facto use: *Williams* v. *Perry* (1), and as the Rent Restriction Act did not in 1915 apply to purely business premises, the standard rent of these premises would be fixed when they were first let as a dwelling-house in August, 1917, when the two rooms with the bathroom, lavatory and w.c. were let at a rental of 185*l.*, far above the statutory limit. No question of apportionment of rent therefore arises, and as far as rent is concerned this flat is not a dwelling-house to which the Act applies.

Next comes the question of rateable value. This is again defined, "except where the context otherwise requires," as the rateable value on August 3, 1914, or in the case of a dwelling-house or part of a dwelling-house first assessed after that date, the rateable value at which it was first assessed. In fact in 1910 the shop and basement were assessed at 263*l.*, the then first and second floors together at 192*l.*, and the then third floor, the floor of this flat, at 78*l.* In 1912 the first floor was thrown into the shop, which was then assessed at 375*l.*; the old second, third, fourth and fifth floors were assessed at 240*l.*; the present flat was not separately assessed. Returning to the definition, this flat was therefore not separately assessed at that date, August 3, 1914, or first assessed after that date. If I am correct that its standard rent is to be fixed in August, 1917, when it was first let after August 3, 1914, as a private dwelling-house, it seems obvious that its rateable value in August, 1914, as a business office must be immaterial to the question whether it is within the Act as a dwelling-house. The date at which the judge has apportioned seems wrong, though as the rateable value of the four floors was the same in 1917 as in 1914, I do not think this makes any practical difference. In law, however, the definition of rateable value does not appear to apply to the facts of this case.

The question still remains whether it is possible to read

(1) [1924] 1 K. B. 936.

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Scrutton L.J.

s. 12, sub-s. 3, in the extended manner I have suggested, or whether the real way to construe the section is not to say that it allows apportionment where you know that the whole house is within the Act by its rent and rateable value, and therefore know that any part of it is within the Act, and fix the apportioned standard rent of that part, so that questions of increase of rent can be determined, but that you cannot use the section where you do not know before you start that the house is within the Act, because the jurisdiction only exists in cases where the house is within the Act. The county court judge seems inclined to take this view, but to get out of it by saying that the assessment of four floors at 240*l.* is evidence that the house is within the Act. But this seems to me to be apportioning before you have settled whether the house is within the Act.

I have carefully examined a large number of the reported apportionment cases. I do not find that the difficulties about apportionment of rateable value have ever been considered. In most of the cases about apportionment of rent the house whose rent was apportioned was within the Acts when apportionment took place, and therefore, of course, a part of it would be also within the Acts. But certainly in one case in the Court of Appeal, *Sutton* v. *Begley* (1), the whole house seems to have been outside the Acts, and yet apportionment took place. I think I am bound by this to hold that it is necessary to read s. 12, sub-s. 3, of the Act of 1920 as applying to cases where it is necessary to apportion to find out whether the case is within the Acts. If so, the judge had a right to apportion the rateable value, but at the same date as that of the standard rent, i.e., when the house was first after 1914 let as a dwelling-house, in August, 1917.

The appeal must be dismissed with costs.

It is satisfactory to me that my Lord now thinks that it would have been better, when *Sinclair* v. *Powell* (2) was

(1) [1923] 2 K. B. 694.

(2) [1922] 1 K. B. 393.

decided, to have adopted my view rather than his own; but I am afraid it comes too late for the present position of the law.

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Appeal dismissed. (1)

Solicitors for appellants: *Beamish, Hanson, Airy & Co., for Dickson, Archer & Thorp, Alnwick.*

Solicitors for respondents: *Gibbs, White & King.*

F. C.

BEVINGTON *v.* PERKS AND THE BELL ASSURANCE SOCIETY (THIRD PARTY).

1925
May 1.

Practice—Costs—County Court—Successful Defendants—Claim exceeding Fifty Pounds—Order for Taxation under Scale B—Special Direction of County Court Judge—Exercise of Discretion—County Courts Acts, 1888 (51 & 52 *Vict. c.* 43), *s.* 113.

On a claim by an unsuccessful defendant against an insurance company as third parties, for indemnity to an amount exceeding fifty pounds, judgment was given for the third parties. The county court judge, without giving any reasons, ordered the unsuccessful defendants to pay costs to the third parties on Scale B, applicable to cases where the amount claimed does not exceed fifty pounds, the scale where that amount exceeds fifty pounds being Scale C. It was not suggested that any facts existed to justify a special direction as to costs under s. 113 of the County Courts Act, 1888:—

Held, that there was no jurisdiction to make the order.

APPEAL from Birmingham county court holden at Warwick.

On December 1, 1924, the plaintiff, Miss Ethel Bevington, an infant, by her mother, Mrs. M. J. F. Bevington, obtained a judgment for 60*l.* damages and costs in the Birmingham county court against the defendant, Mr. H. M. Perks, for injury sustained through the negligent driving of the defendant's servant on September 30, 1923. The defendant

(1) On April 8, 1925, in the case of *Phillips* v. *Potter*, a Divisional Court (Salter and Greer JJ.) decided a similar question upon the construction of s. 12, sub-s. 3, of the Rent Restrictions Act, 1920, holding that a county court judge was entitled to make an apportionment of the rent of the property in which a dwelling-house was comprised, although such rent exceeded the statutory limit.

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was insured against the payment of compensation in respect of his liability for bodily injury to others with the Bell Assurance Society. After the trial the county court judge gave directions for the defendants, the Bell Assurance Society, to be joined as third parties, and the trial (for the convenience of the parties) was held at the Warwick county court on January 30, 1925, the defendant's claim against the third parties being for the amount of the damages and costs paid by him to the plaintiff, which exceeded 100*l.* The county court judge, on his interpretation of the policy, held that it did not cover this particular risk, and gave judgment with costs for the third parties; but without giving any reasons, awarded costs on Scale B only, the scale applicable where the amount claimed does not exceed fifty pounds. The defendant appealed against the order for costs, claiming that it should be on Scale C, the amount claimed exceeding fifty pounds.

H. D. Samuels for the appellants. The county court judge had no power to give this special direction and deprive the successful defendants, which in effect the third parties were, of their costs. The same principle applies to the deprivation of a successful defendant of part of the costs as to deprivation of the whole. The matter is dealt with in s. 113 of the County Courts Act, 1888. (1) The discretion of a county court judge under that section was considered in *Andrew* v. *Grove* (2), and it was held that he could not so exercise it as to make a successful defendant pay the plaintiff's costs. The judge has a discretion to award costs on a higher, but not on a lower scale than the appropriate scale. In *Ritter* v. *Godfrey* (3) Atkin L.J. laid down the following principles

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 113: "All the costs of any action or matter in the court, not herein otherwise provided for, shall be paid by or apportioned between the parties in such manner as the court shall think just, and in default of any special direction shall abide the event of the action or matter. . . . ."

County Court Rules, 1903 to 1924. Order LIII., r. 1: "In every action or matter in any court all costs shall be taxed by the registrar of such court according to the scales of costs in Part IV. of the Appendix. . . . ."

(2) [1902] 1 K. B. 625.

(3) [1920] 2 K. B. 47, 60.

which should guide judges in exercising this discretion. "In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1.) brought about the litigation, or (2.) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3.) has done some wrongful act in the course of the transaction of which the plaintiff complains." It cannot be suggested and was not suggested at the trial that there was any evidence of this kind, and the principle of that case applies here. No doubt the judge sympathised with the defendant, who had certainly been very unfortunate.

No counsel appeared for the respondent.

SALTER J. This appeal raises a point of some practical importance, and I should have been glad to hear it argued on the other side.

The action was brought to recover damages for negligence, and in that action there was judgment recovered against the defendant for 60*l.* and costs. The defendant was insured with the third parties, the Bell Assurance Society, and accordingly he brought them in, claiming an indemnity. On that claim the third parties were successful, the judge finding that the case did not fall within the policy. The amount of the defendant's claim against the third parties considerably exceeded 50*l.* The judge in giving judgment for the third parties, who were in the position of defendants, with costs, directed the costs to be taxed on Scale B, the scale appropriate to a claim not exceeding fifty pounds. Counsel for the third parties submitted to him that he had no power to make the order, but without success.

I am of opinion that the county court judge had no power to make the order. That depends upon s. 113 of the County Courts Act, 1888. [His Lordship read it. (1)] I will read with that section Order LIII., r. 1. [His Lordship read it. (1)] The effect of s. 113 and the rule, read together, is that costs are to abide the event of the action, unless there is a special

(1) Ante, p. 230, note (1).

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Salter J.

direction by the judge. I think further that the direction is that the costs are to abide the event and to be taxed on the prescribed scale, unless there is a special order. But the judge, in exercising his discretion whether he shall give a special direction, either wholly or partly depriving the successful defendants of costs, must exercise that discretion judicially and on proper grounds, and a county court judge has no larger discretion than has a judge of the High Court. It is settled that a judge of the High Court cannot wholly deprive a successful defendant of costs except on special grounds. That point is dealt with by Atkin L.J. in *Ritter* v. *Godfrey*. (1) In the present case there has been no suggestion of conduct on the part of the third parties justifying their being deprived of costs. Therefore I think that the county court judge had no jurisdiction to make the order he did, and that we must vary it by directing that that part of it which directs taxation on Scale B be set aside.

GREER J. I agree that there were no facts which would justify the county court judge in depriving the third parties of any of their costs, and that although he has a discretion he must exercise it judicially and on good grounds. Here there were no such grounds whatever.

Appeal allowed.

Solicitor for appellants: *F. J. Berryman.*

(1) [1920] 2 K. B. 47, 60.

W. L. L. B.

BRIDGES, APPELLANT *v.* GRIFFIN, RESPONDENT. 1925 *May 5.*

Adulteration—Milk—Sale to Prejudice of Purchaser—Milk deficient in Fat—Milk drawn from Tap at Bottom of Churn after Cream had risen—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 4—*Sale of Milk Regulations*, 1901 (*St. R. & O.*, 1901, *No.* 657), *r.* 1.

If a seller of milk puts milk into a churn and allows it to stand, well knowing that in the ordinary course of nature the cream in the milk will rise to the top, and then, after the cream has risen to the top, sells milk which is found to be deficient in milk fat and which is drawn from the bottom of the churn by means of a tap, he is guilty of selling milk which is not genuine, and cannot maintain that the milk when it was sold was in the same condition as that in which it came from the cow.

The respondent, a retail milk seller, was charged with contravening s. 6 of the Sale of Food and Drugs Act, 1875, by selling to the prejudice of the purchaser milk which was not of the nature, substance and quality demanded by the purchaser. The milk was proved to be deficient in milk fat, containing, according to the analyst's certificate, only 1·61 per cent. of milk fat instead of 3 per cent., as required by the Milk Regulations, 1901. The milk was put into the churn in the state in which it came from the cow, and it had not been directly tampered with. The deficiency in milk fat was due to the fact that the cream in the milk had risen to the top of the churn, and the sample of milk was drawn from the bottom of the churn by means of a tap after the cream had risen. The respondent had given instructions to his servant to stir the milk before starting on his round, but these instructions had not been carried out:—

Held, that the respondent had been guilty of the offence charged, having sold as milk something which was not of the nature, substance and quality of the article demanded by the purchaser.

Dyke v. *Gower* [1892] 1 Q. B. 220 and *Penrice* v. *Brander* 1921 S. C. (J.) 63 followed and applied.

CASE stated by justices for the county of Gloucester.

At a Court of summary jurisdiction sitting at Stow-on-the-Wold an information was preferred by Jack Bridges (hereinafter called "the appellant") under the Sale of Food and Drugs Act, 1875, s. 6 (1), against Joseph Griffin (hereinafter called "the respondent") for having on September 8, 1924, by the hands of his servant Robinson unlawfully sold

(1) Sale of Food and Drugs Act, 1875, s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty . . . ."

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to the prejudice of one Jack Bridges, the purchaser, a certain article of food, to wit, milk, which was not of the nature, substance and quality demanded by the purchaser. The justices stated the following case :—

At 9.30 A.M. on September 8, 1924, the appellant purchased a sample of new milk, which was being sold for the respondent by his employee Robinson in Union Street, Stow-on-the-Wold. The quantity purchased was one pint. The appellant thereupon divided the said sample into three parts. One part was sent to the county analyst, another he handed to the said Robinson, and the third part he retained. The appellant subsequently received the analyst's report, which stated that the sample contained only 1·61 per cent. of fat, whereas genuine and normal milk contains at least 3 per cent. of fat, which latter amount has been fixed as a minimum by the Sale of Milk Regulations, 1901, made by the Board of Agriculture acting under the powers conferred upon them by s. 4 of the Sale of Food and Drugs Act, 1899 (1), and dated August 5, 1901. The analyst was therefore of opinion that the sample was deficient in fat, the deficiency amounting to at least 46·3 per cent. of that which should have been present. He added that the deficiency might have been caused either by the partial skimming of the milk, or by the addition to the milk of separated or skimmed milk, and its composition might be expressed thus. Genuine and normal milk 53·7 per cent. Separated or skimmed milk 46·3 per cent. The appellant showed the report to the respondent, who remarked that he had given instructions to the said Robinson always to stir the milk before starting his round, and this the latter had failed to do.

(1) Sale of Food and Drugs Act, 1899, s. 4, sub-s. 1: "The Board of Agriculture may, after such inquiry as they deem necessary, make regulations for determining what deficiency in any of the normal constituents of genuine milk, cream, butter, or cheese, or what addition of extraneous matter or proportion of water, in any sample of milk (including condensed milk), cream, butter, or cheese, shall for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary is proved, that the milk, cream, butter, or cheese is not genuine or is injurious to health, and an analyst shall have regard to such regulations in certifying the result of an analysis under those Acts."

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Upon the hearing of the information on November 13, 1924, the portion of the sample retained by the appellant was produced, and the justices upon the evidence before them found :—

1. That the sample was deficient in fat to the extent shown by the analyst's report.
2. That the milk in the same state as it came from the cows was put in the churn, from which the sample was subsequently taken, at about 7.30 A.M. on September 8, 1924, and from that time until the sample was taken no one had access to the churn or could have tampered with the milk.

On the part of the appellant it was contended that the milk was not of the nature, substance and quality demanded as required by the Sale of Food and Drugs Act, 1875, s. 6.

On the part of the respondent it was contended that even though the milk was not of the nature, substance and quality required by law the presumption of adulteration or abstraction raised by a deficiency of milk fat or of other solids by the Sale of Milk Regulations, 1901 (1), was rebutted by evidence that nothing had been added to or abstracted from the milk by any one covering the whole period from the milking to the delivery to the purchaser.

The attention of the justices was directed to the following decisions : *Bowen* v. *Jones* (2) ; *Kings* v. *Merris.* (3)

The justices, being of opinion that the contention of the respondent hereinbefore mentioned was established by the evidence called in support, dismissed the information.

The question for the opinion of the Court was whether, upon the above statement of facts, the justices came to a correct determination and decision in point of law.

(1) Sale of Milk Regulations, 1901, made by the Board of Agriculture under s. 4 of the Sale of Food and Drugs Act, 1899 : 1. "Where a sample of milk (not being milk sold as skimmed, or separated, or condensed, milk) contains less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk fat, or the addition thereto of water."

(2) (1917) 86 L. J. (K. B.) 802 ; 117 L. T. 125.

(3) [1920] 3 K. B. 566.

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S. L. Porter K.C. and *R. C. Hutton* for the appellant. The justices found that the milk was put in the churn in the same condition as it came from the cow, and that it had not been tampered with, but that is not enough. A vendor of milk, in order to prove that the milk is genuine, must prove that the milk sold to the purchaser was at the time of sale in the same condition as it came from the cow. Under the Sale of Milk Regulations, 1901, if the sample of milk contains less than 3 per cent. of milk fat there is a presumption, in the absence of proof to the contrary, that the milk is not genuine either by reason of the abstraction of milk fat therefrom or the addition thereto of water. It is not necessary that there should be a conscious abstraction of milk fat. If the absence of milk fat from the milk sold is due to natural causes owing to the cream in the milk rising to the top while the milk that is sold is drawn by means of a tap from the bottom of the churn, as was done in the present case, there nevertheless has been an abstraction of milk fat from the milk within the meaning of the Milk Regulation, 1901, so as to give rise to an offence against the Sale of Food and Drugs Acts. The seller must take steps to prevent the natural abstraction of milk fat. In *Dyke* v. *Gower* (1) a milk seller sold milk to customers by dipping it out of a pail with a measure, the cream in the milk rose to the top owing to a neglect to keep the milk stirred, so that the upper portion of the milk contained an excess of fat, and the milk which was sold from the lower portion of the pail was deficient in fat, and it was held that an offence had been committed. In that case the abstraction took place before the milk was dipped out of the pail. That case decides that the sale of milk after the cream in it has risen to the top is the sale of milk which has been altered by the abstraction of a part of it so as to injuriously affect its quality. In *Smithies* v. *Bridge* (2) it was held that where milk, which was in the same state as it came from the cow, was deficient in milk fat owing to the length of time which had elapsed since the cow had been milked, the seller had been guilty of an offence under s. 6 of the Sale of Food and Drugs

(1) [1892] 1 Q. B. 220. (2) [1902] 2 K. B. 13.

Act, 1875. That case is inconsistent with the later decision in *Hunt* v. *Richardson* (1), where it was held that to create an offence under s. 6 of the Act of 1875 it must be shown that the milk has been adulterated either by the addition of some foreign substance or the abstraction of one of its constituent elements: see *Few* v. *Robinson* (2), per Sankey J. In *Hunt* v. *Richardson* (1) nothing had been added to or abstracted from the milk, but it contained less than 3 per cent. of milk fat owing to the manner in which the cows had been fed. If milk is allowed to stand in a churn so that the cream rises to the top and the seller sells milk drawn from the bottom of the churn he cannot say that he is selling milk as it came from the cow. The precise facts in the present case have arisen in two cases in Scotland. In *Knowles* v. *Scott* (3) the milk was proved to be deficient in milk fat but it had not been tampered with, and it was held that the seller had not been guilty of an offence under s. 6 of the Act of 1875, as there was no finding in the case that there was a well known method of redistribution which the vendor had failed to adopt, but the Lord Justice General expressed the opinion (4) that it might be "abstraction of milk fat from the milk to allow it to stand for some time and, without removing the cream from the top, to serve customers with the milk from the bottom of the can." In *Penrice* v. *Brander* (5) the facts were similar, but it was proved that sellers of milk recognized the necessity of redistributing the milk fat and adopted a method for doing so, and it was accordingly held that the offence was proved. In both these cases the deficiency in milk fat was due to the milk having stood for some time in the cans, and to the samples having been drawn from a tap at the bottom of the cans after the cream had risen to the top. Those cases support the appellant's contention.

R. A. Willes for the respondent. The respondent was acquitted by the justices upon certain findings of fact, and the only question in the case is whether upon those findings of

(1) [1916] 2 K. B. 446.
(2) [1921] 3 K. B. 504, 510.
(3) 1918 S. C. (J.) 32.
(4) Ibid. 35.
(5) 1921 S. C. (J.) 63.

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fact the acquittal was right. There is no finding that the milk which was sold to the appellant was drawn from the churn by means of a tap. Neither is there a finding whether the milk which was sold came from the top or the bottom of the churn. There is no Act or Regulation which says what genuine new milk is, or which provides that milk shall contain certain constituent parts. The Sale of Milk Regulations, 1901, only provide that if milk does not contain certain constituents it shall be presumed, until the contrary is proved, that the milk is not genuine, either by reason of the abstraction therefrom of milk fat, or the addition thereto of water. The respondent sold milk in circumstances which raised a presumption that it was not genuine by reason of the abstraction of milk fat or the addition of water. He was charged under s. 6 of the Act of 1875 with selling to the prejudice of the purchaser an article of food which was not of the nature, substance and quality of the article demanded by such purchaser; he was not charged under s. 9 with abstracting from an article of food a part of it so as to affect injuriously its quality, substance or nature.

[LORD HEWART C.J. Sect. 9 deals with abstraction of part of an article of food by a person, but s. 6, which does not expressly deal with abstraction, prohibits a person from selling an article of food to the prejudice of the purchaser, and if milk contains less than a certain proportion of milk fat it is presumed not to be genuine by reason of the abstraction of milk fat. It does not follow, however, that an offence may not be proved under s. 6, although no offence could be proved under s. 9.]

The seller proved that the milk had not been tampered with after coming from the cow until it was sold to the purchaser. The question discussed before the justices was the possibility or not of interference with the milk by the addition of water or the abstraction of milk fat. The Milk Regulations do not say that the analyst's certificate shall be conclusive evidence that the milk is not genuine, but merely that a presumption shall be raised to that effect, until the contrary is proved. That presumption can be rebutted by

showing the history of the milk and that nothing has been added to or abstracted from the milk, but that it was sold in the same condition as it was when it came from the cow: *Kings* v. *Merris*. (1) In the present case there are no gaps in the history of the milk and the respondent ought to succeed, unless it is shown that he has taken advantage of the acts of nature to abstract the fat. But that has not been proved. It is sought to convict the respondent merely because he sold milk that was not stirred before sale.

[LORD HEWART C.J. It is said that he has committed an offence against s. 6 of the Act of 1875, because he sold milk which was not genuine by reason of the abstraction therefrom of milk fat.]

The Legislature has not said that milk must be stirred by the vendor before being sold. The cream may be absent from the milk that was sold to the appellant, but it has not been abstracted. In order to create an offence under s. 6 of the Act of 1875 it must be shown that the milk has been adulterated either by the addition of some foreign substance or the abstraction of one of its constituent elements: *Few* v. *Robinson*. (2) In *Grigg* v. *Smith* (3) the milk was deficient in milk fat owing to the manner in which the cow had been milked, but it was held that as it was sold as it came from the cow without abstraction or addition no offence had been committed against s. 6 of the Act of 1875. Similarly in *Williams* v. *Rees* (4) milk was sold as it came from the cow, but it was deficient in milk fat owing to the fact that the cow had grazed on poor pasture, and it was held that no offence had been committed against s. 6. The Scottish case of *Penrice* v. *Brander* (5) is distinguishable, as that case was based upon findings of fact which are absent in the present case.

LORD HEWART C.J. This case is somewhat compendiously stated, but it is apparent from what is contained in it and

(1) [1920] 3 K. B. 566.
(2) [1921] 3 K. B. 504, 510.
(3) (1917) 87 L. J. (K. B.) 488; 117 L. T. 477.
(4) (1917) 87 L. J. (K. B.) 639; 118 L. T. 356.
(5) 1921 S. C. (J.) 63.

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from what has been stated at the bar that the real question raised by the case is that which is indicated by two passages in the case itself.

The respondent, Joseph Griffin, was charged with having unlawfully sold, by the hand of his servant, milk which was not of the nature, substance and quality of the article demanded by the purchaser. The justices dismissed the information, and they state that the appellant asked for new milk and received from the hand of the respondent's servant what was reputed to be new milk, and when the respondent knew that the milk had been analysed, he said that he had given instructions to his servant always to stir the milk before commencing his round, but that the servant had failed to do so. The justices found that the sample of milk was deficient in fat to the extent shown by the analyst's report; that milk in the state in which it came from the cow was put into the churn, from which the sample was subsequently taken, at about 7.30 A.M. on September 8, 1924; and that from the time the milk was put into the churn until the time when the sample was taken no one had access to the churn or could have tampered with the milk. The contention on the part of the appellant was the simple contention that the milk he received was not of the nature, substance and quality of the article demanded as required by s. 6 of the Sale of Food and Drugs Act, 1875.

It is reasonably clear, and the argument has proceeded upon the footing, that the real question involved in the case is this: Whether there can be said to be an abstraction of milk fat from the milk sold when all that has happened is that the seller has put new milk into some receptacle and then allowed the cream in that milk to rise and collect at the top of the milk, and has afterwards sold as new milk some milk which by reason of the construction of the receptacle has been drawn from a place near the bottom of the receptacle.

It is important to see how that question arises. The charge made against the respondent was that there had been a sale of milk which was not of the nature, substance and quality

of the article demanded. Under s. 4 of the Sale of Food and Drugs Act, 1899, the Board of Agriculture have power to make regulations. Regulations have been made, but they are only for the purpose of raising a presumption that the milk is not genuine. They are not, and do not purport to be, an enumeration of all the ways in which the purchaser's allegation may be established. They merely provide a convenient short cut for proving the allegation. Sect. 4, sub-s. 1, of the Sale of Food and Drugs Act, 1899, under which the regulations are made, provides as follows: "The Board of Agriculture may, after such inquiry as they deem necessary, make regulations for determining what deficiency in any of the normal constituents of genuine milk . . . . or what addition of extraneous matter or proportion of water, in any sample of milk . . . . shall for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary is proved, that the milk . . . . is not genuine . . . ." The Board of Agriculture have accordingly made regulations dated August 5, 1901, and named the Sale of Milk Regulations, 1901, which provide by reg. 1 that "where a sample of milk . . . . contains less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk fat, or the addition thereto of water." The regulation does not purport to contain a definition of genuine milk. Its function is to offer a mode of proof that the sample of milk is not genuine. In the present case an analyst's certificate was put in evidence which showed a deficiency of milk fat in the milk sold to the extent of at least 46 per cent. The sample of milk had therefore less than one-half the milk fat it ought to have had. It is to be observed upon the wording of the Sale of Milk Regulations, 1901, that when the analyst's certificate shows a certain result it is presumed, until the contrary is proved, that "the milk" is not genuine by reason of the abstraction therefrom of milk fat, or the addition thereto of water. It is clear that "the milk" there referred to, and about which the presumption arises, is the milk which has been

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sold and not the milk in bulk. In the present case, the analyst's certificate having been put in, the burden of proof shifted to the respondent to show that the milk sold was genuine milk, and thereupon the respondent undertook to establish the defence which was put forward successfully in *Hunt* v. *Richardson* (1)—namely, that the milk which was sold to the appellant was sold in the condition in which it came from the cow. It is to be observed that in *Hunt* v. *Richardson* (1) nothing was added to or subtracted from the milk which was sold. In the words of A. T. Lawrence J. (as he then was) (2): "In this case it is found as a fact that the milk in question was when sold the morning product in its natural condition of a herd of good cows. It had nothing abstracted from it and nothing added to it. It was genuine new milk." In these cases the important moment to consider is the moment of sale, and the important milk is the milk that is sold. The question is whether the milk when sold was itself in the condition in which it came from the cow. The justices have found that the defence was made out merely because when the whole of the milk was put into the churn some time before the sale it was in the same condition as that in which it came from the cow. There is no finding that the milk which was sold was at the time of sale in the condition in which it came from the cow. What is said on the part of the appellant is that the milk in the churn was allowed to stand and the cream to rise to the top; that the milk which was actually sold to the appellant was drawn out of the churn by means of a tap near the bottom of the churn after the cream had risen from it; and that therefore the milk so sold to the appellant had ceased to be in the condition in which it came from the cow.

A case which was decided in 1892—namely, *Dyke* v. *Gower* (3)—is a similar case to the present one. There a retail milk seller poured into a pail eight barn gallons of unskimmed milk, which she sold therefrom in small quantities to her customers, dipping it out of the pail from time to time

(1) [1916] 2 K. B. 446. (2) Ibid. 467.
(3) [1892] 1 Q. B. 220.

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with a measure. The sale of the contents of the pail extended over several hours, during the whole of which time, owing to the neglect of the seller to keep the milk stirred, the cream was continually rising to the surface. When not more than two quarts of milk remained in the pail, an inspector purchased a pint of milk, which was served to him from the pail, and which, upon analysis, showed a deficiency of 33 per cent. of fatty matter. The seller did not disclose the deficiency to the inspector. It was found that the deficiency was entirely due to the manner in which the earlier customers had been served, and the seller was found guilty of an offence against s. 9 of the Sale of Food and Drugs Act, 1875, in selling the milk without disclosing its condition. Lord Coleridge C.J. in the course of his judgment said (1): "A milk seller had milk sent up to her from the country in comparatively large quantities; she poured it into a pail and sold it in small quantities to her customers, for that purpose dipping it from time to time out of the pail with a measure. It is matter of common knowledge that, unless milk is frequently stirred, there is a tendency on the part of the cream or fatty matter of the milk to rise to the top, leaving the lower portion of the milk denuded of the fat which it originally contained. The milk seller sold the milk in that condition." A little later the Lord Chief Justice went on to say (2): "In the course of the sale of the greater portion of the pail, owing to a neglect to keep the milk stirred, there had been, unconsciously perhaps, abstracted from the milk its fatty matter to an extent which injuriously affected its quality." What was done in that case was said to be an abstraction of fatty matter. But abstraction from what? The abstraction which is in question in such a case is the abstraction of milk fat from that portion of the milk which is sold. It was not by the dipping of the measure into the pail that the cream was taken out of that milk. The abstraction of the cream from the milk that was sold was due to natural causes. The cream rose to the top before the sale of the particular milk took place. What is the difference in principle between that case

(1) [1892] 1 Q. B. 222. (2) [1892] 1 Q. B. 223.

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and this? The charge against this respondent is that he sold milk which was not genuine. What is the real difficulty in the view that if a person puts milk into a receptacle well knowing that if it is left without being stirred the cream in the milk will rise to the top, and leaves it without being stirred till the cream has risen, and then sells milk drawn by means of a tap from the lower portion of the churn, he cannot succeed in the defence that the milk so sold is in the same condition as that in which it came from the cow?

The matter has been discussed in two cases in Scotland. In *Knowles* v. *Scott* (1) the Lord Justice General (Lord Strathclyde) said (2): "I am very far from saying that it might not be abstraction of milk fat from the milk to allow it to stand for some time and, without removing the cream from the top, to serve customers with the milk from the bottom of the can. I can conceive of circumstances in which I would be prepared to hold that that was abstraction." In the particular circumstances of that case the decision was in favour of the seller of milk. But that was because there was no statement of fact in the case that it was the practice, by some well known method, to restore the milk to its original condition. That expression of opinion was followed in *Penrice* v. *Brander*. (3) In that case a farmer was charged with contravening s. 6 of the Sale of Food and Drugs Act, 1875, by selling sweet milk which was not genuine in the sense that it contained less than 3 per cent. of milk fat. The alleged deficiency in fat was established, but it was also proved that the milk had not been directly tampered with, the deficiency being due to the milk having stood for some time in the cans, and to the samples having been drawn from the tap at the bottom after the cream had risen. It was further proved that sellers of milk recognized the necessity of redistributing the milk fat, and that the method which the accused instructed his servant to follow, but which his servant omitted on the occasion in question, was to draw off a quantity of milk from the bottom of the can and to pour it

(1) 1918 S. C. (J.) 32. (2) Ibid. 35.
(3) 1921 S. C. (J.) 63.

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in at the top before proceeding to sell the milk. The sheriff substitute held that the offence had been proved, and the appeal against that decision was dismissed. The Lord Justice Clerk (Lord Scott Dickson) said (1): "The case is really concluded, I think, by the case of *Knowles* v. *Scott*. (2) It is true that the decision in that case was in favour of the accused; but I think it is apparent, from the opinions delivered, that that was solely due to the fact that the case did not contain a finding that there was a well known method of redistributing the fat in the milk which the accused had failed to adopt. In the present case we have a finding to that effect, and I have no doubt but that the judges who decided *Knowles'* case (2) in favour of the accused would have decided the present case in favour of the prosecutor, had it come before them . . . . in this case I think we have enough to show that there has been abstraction, for, although there was no artificial means used except confining the milk in a closed vessel, the necessary result was that, by the operation of the laws of gravity, the milk fat in the shape of the cream ascended to the top, and people who got the milk drawn off from a tap at the bottom got—at any rate for some time—milk of poorer quality than that produced by the cow." Lord Dundas gave judgment to the same effect. Lord Ormidale said (3): "The peculiarity of the case seems to me to be this, that the process of abstraction was, in a sense, a natural one which required no artificial aid from the seller of the milk, and did not receive any assistance from him. But this process of abstraction was not necessarily a permanent withdrawal from the milk of the milk fat, and could be rectified by the seller by the simple process of remixing; and it is the appellant's failure to apply that process which makes him, in my opinion, liable to conviction." In other words, we are remitted to the phrase employed by Lord Coleridge C.J. in *Dyke* v. *Gower* (4)—namely, "owing to a neglect to keep the milk stirred." The Scottish decision is not binding upon this Court, but it is entitled to respect,

(1) 1921 S. C. (J.) 65.
(2) 1918 S. C. (J.) 32.
(3) 1921 S. C. (J.) 67.
(4) [1892] 1 Q. B. 223.

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and the reasoning on which it is based harmonises well with the judgment in *Dyke* v. *Gower*. (1)

In these circumstances I do not think it was open to the justices to find that the sample of milk sold to the appellant was at the time of sale in the condition in which it came from the cow. The analyst's certificate having been proved there was a presumption, which was not rebutted by the respondent, that the milk was not genuine. In the result I think that the appellant's contention was right—namely, that the milk sold to him was not of the nature, substance and quality of the article demanded within the meaning of s. 6 of the Sale of Food and Drugs Act, 1875. The respondent knew what result would probably follow if certain steps were not taken, and he accordingly instructed his servant to stir the milk before starting on his round, but the servant failed to do so. There was no suggestion that the method which was indicated for remixing the milk was impracticable. What was put forward before the justices was that these precautions were not taken, only for the reason that the instructions which the respondent gave to his servant were not carried out.

In my opinion the justices came to an erroneous conclusion, and the appeal must be allowed.

AVORY J. I agree. In view of the facts which have been stated to the Court and the arguments which have been put forward, I think that we are bound to assume that the milk which was sold to the inspector was drawn off from the churn by means of a tap at the bottom of the churn, and that the deficiency in milk fat of the milk so sold was due to the fact that the cream in the milk had risen and collected at the top. In these circumstances the only question is whether, the purchaser having asked for new milk, the article supplied to him was of the nature, substance and quality of the article demanded. In other words, was it new milk? The Sale of Milk Regulations, 1901, r. 1, only gives rise to a presumption; it does not say that milk is genuine if there

(1) [1892] 1 Q. B. 220.

has been no abstraction therefrom of milk fats or addition thereto of water. It merely provides that an analyst's certificate showing that the sample of milk contains less than 3 per cent. of milk fat raises a presumption, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk fat, or the addition thereto of water. But it leaves it open to the vendor to rebut that presumption, and just as the vendor may rebut that presumption by showing that the milk sold is in the same state as it came from the cow, so also the prosecution may show that even though there has been no interference with the milk by the hand of man nevertheless the milk is not genuine new milk. I think that gets rid of the difficulty as to whether or not there has been any abstraction of milk fat from the milk. It is true that s. 9 of the Sale of Food and Drugs Act, 1875, appears to contemplate the abstraction by a person from an article of food of any part of it so as to affect injuriously its quality, substance or nature, and it may be that the Sale of Milk Regulations, 1901, contemplate the same thing, but even if they do, the purchaser of milk is not bound to show that there has been some personal interference with the milk by the hand of man. It may be that the collection of the cream at the top of the milk is due to natural causes, but if the cream does collect on the top of the milk it is the duty of the vendor, by stirring the milk, to see that the milk at the bottom of the churn has its proper proportion of cream.

I should have been prepared to follow the decision in the Scottish case of *Penrice* v. *Brander* (1), and more especially the judgment of Lord Ormidale, who said (2): "The peculiarity of the case seems to me to be this, that the process of abstraction was, in a sense, a natural one which required no artificial aid from the seller of the milk, and did not receive any assistance from him. But this process of abstraction was not necessarily a permanent withdrawal from the milk of the milk fat, and could be rectified by the seller by the simple process of remixing; and it is the appellant's failure

(1) 1921 S. C. (J.) 63. (2) Ibid. 67.

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to apply that process which makes him, in my opinion, liable to conviction."

I only wish to add that in my view the decision we are giving does not in any way conflict with the decision in *Hunt* v. *Richardson*. (1) In that case no question arose as to milk fat having been abstracted from the milk that was sold.

I agree that this appeal ought to be allowed.

SHEARMAN J. I am of the same opinion, but I desire to add a few words to what has been already said. The summons in this case against the respondent was under s. 6 of the Sale of Food and Drugs Act, 1875, for having unlawfully sold, to the prejudice of the purchaser, milk which was not of the nature, substance and quality demanded by the purchaser. In all these cases one has to start with the decision in *Hunt* v. *Richardson*. (1) In that case the Court was trying to reconcile conflicting decisions. In considering the effect of that case one must also take into consideration the decision in *Few* v. *Robinson* (2), where the members of the Court agreed in laying down what *Hunt* v. *Richardson* (1) really did decide—namely, that in order to create an offence under s. 6 of the Act of 1875 it must be shown that the milk has been adulterated either by the addition of some foreign substance or the abstraction of one of its constituent elements, and that the mere fact that the milk was not of the quality contracted for by the purchaser did not make the sale an offence against the section. In the present case the only evidence given of the adulteration of the milk was the production of an analyst's certificate showing a deficiency of milk fat in the milk sold to the appellant to the extent of 46 per cent. The explanation given by the respondent was that the milk had been put into a churn, and that, contrary to his instructions, it had not been stirred, and consequently the cream in the milk had risen to the top, whereas the milk that had been sold was drawn from the bottom of the churn by means of a tap. The Sale of Milk Regulations, 1901, reg. 1, provides that "Where a sample of milk . . . . contains

(1) [1916] 2 K. B. 446. (2) [1921] 3 K. B. 504.

less than 3 per cent. of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction thereform of milk fat, or the addition thereto of water." It is said that that presumption has been rebutted in the present case, because there is a finding by the justices that the milk was put into the churn in the same state as it came from the cow, and that from that time until the time when the sample was taken no one had access to the churn or could have tampered with the milk, and that consequently there had been no abstraction of milk fat from the milk. I cannot agree with that contention. What is meant by abstraction? I cannot think that it means anything other than abstraction by the seller. We have the decision of the Divisional Court in *Dyke* v. *Gower*. (1) In that case a milk seller put a quantity of milk into a pail, and sold it in small quantities to customers by dipping it from time to time out of the top of the pail with a measure, and owing to the fact that the sale of the milk extended over several hours the cream in the milk was continually rising to the top through the neglect of the seller to keep the milk stirred, the upper portion of the milk that was sold containing more cream than the lower portion. It was held that owing to the neglect of the seller to keep the milk stirred there had been, unconsciously perhaps, abstracted from the milk at the bottom of the pail its fatty matter to an extent which injuriously affected its quality. That is the converse case to the present case, because here all that was done was to pour new milk into a churn and allow it to stand, with the result that the cream in the milk rose to the top, and then to sell milk which was drawn out from the bottom of the churn by means of a tap. I think it cannot be said that the respondent did not abstract the milk fat from the milk so sold. He put the milk into the churn well knowing that the milk fat in the milk would, owing to natural causes, rise to the top of the milk unless it was kept stirred, and nevertheless omitted to see that it was kept stirred. That is the

(1) [1892] 1 Q. B. 220.

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only thing that was done here. The presumption that milk is not genuine by reason of the abstraction therefrom of milk fat can be rebutted, but it is not rebutted if some milk fat has been abstracted from the milk, and in the present case there was evidence that some milk fat had been abstracted from the milk sold to the appellant. I therefore agree that the appeal must be allowed.

Appeal allowed. Case remitted.

Solicitors for appellant: *Gibson & Weldon, for Wellington, Clifford & Matthews, Gloucester.*

Solicitors for respondent: *Smiles & Co., for Steel & Broom, Stow-on-the-Wold.*

R. F. S.

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May 6, 7.

THE KING *v.* SWANSEA INCOME TAX COMMISSIONERS.

Ex parte ENGLISH CROWN SPELTER COMPANY, LIMITED.

Revenue—Income Tax—Assessment—Prohibition—Trading Loss—No Appeal—Jurisdiction of Commissioners—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

In October, 1924, the applicants, a trading company, were assessed to income tax by the General Commissioners for the year ending April 5, 1925, under Sch. D, Case I., of the Income Tax Act, 1918, on an amount computed on their average profits for the three preceding years. At the time the assessment was made it was impossible for the applicants to ascertain whether there would be a balance of profits for the year in question, and no notice of appeal against the assessment was given. After the time for appealing had expired, the applicants alleged that they had ascertained that during the year of assessment their business had resulted in a loss, whereupon, claiming that they were not liable to be assessed at all, they obtained a rule for a writ to prohibit the General Commissioners from making, allowing, confirming, enforcing, or otherwise proceeding upon the assessment:—

Held, that prohibition would not lie to the General Commissioners, who had acted in accordance with their statutory duty in making the assessment and had not exceeded their jurisdiction.

Per Lord Hewart C.J.: The principle laid down in *Whelan* v. *Henning* [1925] 1 K. B. 387 has no application to an assessment under Sch. D, Case I., of the Income Tax Act, 1918.

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RULE NISI directed to the General Commissioners of Income Tax for Swansea to show cause why a writ of prohibition should not be awarded prohibiting them from making, allowing, confirming, enforcing or otherwise proceeding upon a certain assessment upon the English Crown Spelter Company, Ld., for the year ending April 5, 1925, dated October 9, 1924, under Case I. of Sch. D to the Income Tax Act, 1918.

The company, whose office was in Swansea, received notice in October, 1924, that they had been assessed by the General Commissioners for that district at the net amount of 60,059*l.* computed on an average of the three business years 1921, 1922 and 1923 respectively. There was no dispute as to the amount stated in the notice of assessment, assuming that the company were liable to be so assessed, and accordingly no notice of appeal was given and the time for giving notice of appeal had long since expired. According to the affidavit of the secretary of the company it was impossible at the date when the notice of assessment was received, or during the period allowed for giving notice of appeal, to ascertain whether there would in fact be a balance of profits and gains in the company's business in respect of the year ending April 5, 1925. In fact, according to the affidavit, the company's business during the year resulted in a loss of 2985*l.* 19*s.* 3*d.* The company therefore claimed that unless they made a profit they were not liable to be assessed at all, and thereupon they obtained this rule on March 31, 1925.

Affidavits were filed in reply by the inspector of taxes and the clerk to the General Commissioners in which it was stated that the assessment was made on figures shown in the company's accounts for the three years preceding the year of charge, and that as no notice of appeal had been given in respect of the assessment, it was accordingly duly allowed and confirmed on November 26, 1924, the time for appealing having then expired. The allegation that the company's business for the particular year had resulted in a loss was not admitted by the inspector, and it was said by the clerk to the General Commissioners that no evidence had been produced showing a loss.

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Sir Douglas Hogg A.-G. and *R. P. Hills* for the inspector of taxes showed cause. This application is misconceived. Parliament has given to the General Commissioners the power to determine all questions of law and fact subject to appeal by way of case stated. This Court has therefore no jurisdiction to determine the questions of law and fact involved in this case. Sect. 100 and following sections of the Income Tax Act, 1918, provide for the method of assessment; s. 136 gives to a person aggrieved by an assessment a right to appeal to the General Commissioners; and s. 149 provides for appeals from the General Commissioners by way of case stated. Unless the Commissioners' decision is thus challenged the assessment is final and conclusive: see per Parke B. in *Allen* v. *Sharp* (1); per Lord Esher M.R. in *Reg.* v. *Commissioners for Special Purposes of Income Tax* (2); *Rex* v. *Bloomsbury Income Tax Commissioners.* (3) There was clear jurisdiction in the Commissioners to make the assessment complained of, and there was no appeal against it. In those circumstances prohibition will not lie. Prohibition lies to prevent a usurpation of jurisdiction; it is not a general method of appealing. There is no precedent for such an application to this Court; in fact it was decided in *Rex* v. *Inspector of Taxes for Kingsland Parish* (4) that prohibition would not lie; see also *Rex* v. *Clerkenwell General Commissioners.* (5) The applicants desire to extend the decision in *Whelan* v. *Henning* (6) to Case I. of Sch. D. In that case both Warrington and Scrutton L.JJ. expressly said that they confined their judgment to cases arising under Case V. We contend that *Whelan* v. *Henning* (6) was wrongly decided even on Case V., and an appeal from the decision of the Court of Appeal is now pending in the House of Lords.

Bremner for the General Commissioners.

Sir Patrick Hastings K.C. and *Roland Burrows* for the applicants. In *Whelan* v. *Henning* (6) Scrutton L.J. said (7):

(1) (1848) 2 Ex. 352, 363.
(2) (1888) 21 Q. B. D. 313, 319, 320.
(3) [1915] 3 K. B. 768.
(4) (1922) 8 Tax Cas. 327.
(5) [1901] 2 K. B. 879.
(6) [1925] 1 K. B. 387.
(7) Ibid. 397.

"I understand the judgments of the three Lords who formed the majority [in *Brown* v. *National Provident Institution* (1)] to proceed on the lines that what is assessed is profits made in the year of assessment; that if there are no profits there can be no assessment; and that the fact that if there are profits they are to be computed in accordance with an average of previous years does not enable such a computation to be made when there are no profits to assess . . . . . I can see no difference on this head between Case III. of Sch. D, the subject matter of *Brown's* case (1), and Case V., the subject matter of this case." That applies here. If the Attorney-General's argument is sound Henning would have been debarred from prohibition. Here, assuming that the present applicants are in the same position as Henning, that is, that their point of law is good, the question is whether prohibition is the proper remedy. If that remedy is not open, there is none available at all. There can be no appeal, inasmuch as at the time the assessment was made the applicants did not, and could not, know that there would be a loss. They could not put in a hypothetical appeal. Further, the mere existence of another statutory remedy does not prevent the Court issuing a writ of prohibition. No point was taken by the Crown in *Rex* v. *Newmarket Income Tax Commissioners* (2) that prohibition would not lie.

[LORD HEWART C.J. referred to s. 34 of the Income Tax Act, 1918.]

That section enables an adjustment of liability to be made in case of loss; but where there is no initial liability s. 34 cannot apply.

[LORD HEWART C.J. The fact that a trading loss was sustained is not admitted.]

The Court can ascertain whether there has been a loss by directing an issue to be tried.

LORD HEWART C.J. In my opinion this rule must be discharged. The essence of the matter has, I think, been stated in a single sentence which Mr. Bremner addressed

(1) [1921] 2 A. C. 222. (2) [1916] 1 K. B. 788.

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to the Court—namely, that the Commissioners have acted throughout in accordance with their statutory duty and there is no evidence of any excess of jurisdiction. I need not repeat the passages which have been cited from such cases as *Reg.* v. *Commissioners for Special Purposes of Income Tax* (1) and *Rex* v. *Inspector of Taxes for Kingsland Parish.* (2) The principle is quite clear that a writ of prohibition is issued only where there is something done in the absence of jurisdiction or in excess of jurisdiction. What is it that is complained of here? This trading company, which is within the jurisdiction of the Swansea General Commissioners, made a return. A question then arose as to the figures, and the three years' average was carefully worked out and the assessment made. But it is said that it now appears that the trading in the particular year resulted in a loss, and therefore—and here comes the non sequitur—the Commissioners had no jurisdiction to make, and ought to be prohibited from making the assessment they have made, from allowing the assessment they have allowed, from confirming the assessment they have confirmed, and from enforcing or otherwise proceeding upon it. It is said that although everything was present to give jurisdiction to the Commissioners to make the assessment at the time they made it, nevertheless because it now appears that in the particular year of trading there was a loss, if that does appear, the Commissioners ought to be prohibited. The general principle applicable in such a case as this is stated in *Allen* v. *Sharp* (3), where Parke B. said this (4): "On a careful consideration of these Acts of Parliament, they seem to me to differ from the statute of Elizabeth, as to poor rate, and that the Legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive, unless appealed from, in the first place, to the Commissioners, and further, if necessary, to the judges of the superior Courts. It would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the

(1) 21 Q. B. D. 313.
(2) (1922) 8 Tax Cas. 327.
(3) 2 Ex. 352.
(4) Ibid. 363.

judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors. Actions would be innumerable, juries would have to decide on facts without end, judges on law, and cases would be carried to the highest tribunal, when the exigencies of the State required a speedy determination. Without referring to the statutes, I should say, a priori, that the object of the Legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out."

The argument in support of the rule involves various matters to which I must refer. In the first place, the foundation of the argument is that the principle laid down in *Whelan* v. *Henning* (1) applies to such a case as this—namely, a case under Sch. D, Case I. No question arises here concerning the decision in *Whelan* v. *Henning*. (1) We are told that there is an appeal pending to the House of Lords, but for the present the decision stands. When, however, the judgments are examined it is abundantly clear that the case which was being dealt with was not only not a case like the present, but that the area and limits of the decision were in the most express and clear terms confined to a portion of Sch. D with which the present case has nothing to do. For example, Warrington L.J. said (2): "I should like to say that in this judgment I propose to confine myself to the consideration of the case before me, that is to say, a case arising under Case V. of Sch. D, and it must be left for another tribunal to determine the position under other circumstances and under other cases of the same schedule, or under other schedules." Again, in the same case, Scrutton L.J. said (3): "I wish however to confine my decision at present to Case V. of Sch. D, the case before us, and leave other cases on schedules to be dealt with when they arise." In those circumstances it is a somewhat large assumption to begin by contending that the decision in *Whelan* v. *Henning* (1) covers such a case as this. In my opinion it does not. If the question were raised whether similar considerations ought to apply to such a case as the

(1) [1925] 1 K. B. 387. (2) Ibid. 395.
(3) Ibid. 398.

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present notwithstanding the clear and express limitations of the judgments in *Whelan* v. *Henning* (1) there might be something to be said for, and a great deal to be said against, that view. But it is unnecessary for the decision of this case to express an opinion upon it. Having regard to the language of s. 34 of the Income Tax Act, 1918, I think it exceedingly difficult to argue that that section which gives relief in respect of certain losses can co-exist with an extension of the decision in *Whelan* v. *Henning* (1) in the way contended for. Otherwise it would appear that while the statute gives an extremely limited relief where a trader has sustained a loss, the true principle of law is that he is not to be assessed at all or, if assessed, that he is to be assessed at nil. I cannot reconcile the two things.

A second assumption is made. It is said that in this case there is no appeal at all. It is quite obvious to the extent of the remedy provided by s. 34 that there is an appeal. But it is said that that is of no moment because it does not permit the true basis of appeal, and that the true basis of appeal is to be found by looking at the judgments in *Whelan* v. *Henning* (1) The same point as the first is merely repeated. I express no opinion upon the question whether under s. 136 of the Income Tax Act, 1918, in such a case as the present, there is proper ground for an application to the General Commissioners. It does not seem necessary to decide that point.

Thirdly, it is assumed that in this case there has in fact been a loss. The whole argument falls to the ground unless it is found or admitted that in the year referred to there was a loss, and it is suggested, with an appearance of seriousness, that this Court is the tribunal which should undertake the task of deciding whether there has been a loss or not, and for that purpose the Court ought to direct an issue or order pleadings to be delivered. In other words, the argument involves this, that this Court is to undertake the very task which in the clearest language the statute has imposed upon the General Commissioners. That argument is put forward,

(1) [1925] 1 K. B. 387.

paradoxically enough, in an argument for a writ of prohibition which is based upon a lack, or an excess, of jurisdiction in the Commissioners in entertaining the very question which under the statute they have to undertake. It is quite clear to my mind that this Court cannot entertain the question whether there has been a loss in this particular year.

The two assumptions, first, that the principle laid down in *Whelan* v. *Henning* (1) extends to Sch. D, Case I., and, secondly, that there is no appeal, are in my opinion entirely wrong. There has been no excess of jurisdiction; the Commissioners have performed their statutory duty; and therefore this rule must be discharged.

AVORY J. I am of the same opinion, and I confine my judgment to the question whether prohibition is in this case a proper remedy, even upon the assumption which Sir Patrick Hastings has invited us to make that the applicants, although they are persons who come within Sch. D, Case I., are nevertheless not liable to be assessed if in fact they have made no profit in the year of assessment, notwithstanding that Sch. D expressly provides that the tax shall be computed upon the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the trade have been usually made up. I say that upon that assumption, although the fact whether there was a loss or not is in controversy, prohibition is not the proper remedy. In my opinion that point is covered by the decisions in *Allen* v. *Sharp* (2) and *Rex* v. *Bloomsbury Income Tax Commissioners* (3), where Lord Reading C.J. quoted and applied the following passage from the judgment of Lord Esher M.R. in *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (4): "When an inferior Court or tribunal or body, which has to exercise the power of deciding facts, is first established by

(1) [1925] 1 K. B. 387.
(2) 2 Ex. 352.
(3) [1915] 3 K. B. 768.
(4) 21 Q. B. D. 313, 319.

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Act of Parliament, the Legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The Legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the Legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the Legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction." That was applied to the Commissioners of Income Tax. The same principle was adopted by the Court of Appeal in *Rex* v. *Clerkenwell General Commissioners* (1), which raised the question of the liability of the Kodak Company to be assessed. A. L. Smith M.R. there said (2): "Now, what is it that the General Commissioners of Taxes have to ascertain? Surely they have to ascertain what trade a taxpayer who is assessable to income tax is carrying on, and to do this it is within the jurisdiction of the Commissioners to ascertain what is the connection

(1) [1901] 2 K. B. 879. (2) Ibid. 886.

between the Kodak Company in this country and the Rochester business in America. This is what the Commissioners are doing, and I agree with the King's Bench Division that the assertion that the Commissioners have gone, or are going, wrong in determining this question gives no ground for prohibition." Therefore the application for a writ of prohibition was dismissed. Vaughan Williams L.J., dealing with the same point, said (1): "Kodak, Ld., contend that the facts assumed by the Commissioners as the grounds of assessment are facts, or inferences of fact, preliminary to the power or jurisdiction of the Commissioners to charge Kodak, Ld., in respect of the business and profits carried on and made at Rochester in the United States, and contend that the Commissioners cannot by finding facts or drawing inferences give themselves jurisdiction to charge Kodak, Ld., in respect of such business and profits. It is, on the contrary, contended on behalf of the Crown and the Commissioners that such facts and inferences of fact are not preliminary to the jurisdiction of the Commissioners, and that all that is necessary to found the jurisdiction of the Commissioners and to give them power to assess the duty to be paid by Kodak, Ld., is that Kodak, Ld., should be engaged in trade, as it is admitted Kodak, Ld., is, within the district of the Commissioners in Great Britain, and that the question whether the business carried on at Rochester is the business of Kodak, Ld., is not a question as to a fact preliminary to jurisdiction, but merely as to a fact going to the quantum of the taxable liability of persons admittedly subject to the jurisdiction of the Commissioners in respect of the quantum of that liability." The Lord Justice agreed therefore that prohibition would not lie. The same point was also expressly decided on the same principle in *Rex* v. *Inspector of Taxes for Kingsland Parish.* (2) For these reasons I agree that the rule should be discharged.

SHEARMAN J. I am of the same opinion. I have no doubt that this rule was applied for because the applicants desired,

(1) [1901] 2 K. B. 888. (2) 8 Tax Cas. 327.

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if they could, to raise the wide general question whether the ground of the decision in *Whelan* v. *Henning* (1), which arose under Case V., could be extended to all trading companies under Case I. That is a very important and interesting question upon which I express no opinion, for, in my judgment, this application fails on another ground. The rule was obtained on the ground that the applicants were persons not liable to be assessed. These words are ambiguous; they can be used in two ways. No doubt there may be cases in which prohibition may be obtained where the applicant shows that he is not liable to the jurisdiction of the Commissioners at all. That is not what is meant here. What the applicants say is that the assessment ought to be nil; that they are in the same position as a person with an income less than 130*l.*, and so not liable to the tax. Here it is clear that the Commissioners had jurisdiction. It is suggested that it is for us to ascertain whether there has been a loss or not in the applicants' trading; but the scheme of the Income Tax Acts makes it clear that it was never intended that this question should be considered by any one except the Commissioners.

Rule discharged.

Solicitor for inspector of taxes: *Solicitor of Inland Revenue.*

Solicitors for Commissioners: *W. W. Wynne & Sons.*

Solicitors for applicants: *Barnett Tuson & Co.*

(1) [1925] 1 K. B. 387.

J. S. H.

BAINBRIDGE *v.* CONGDON.

1925
May 4.

Landlord and Tenant—Rent Restriction—Standard Rent—Apportionment "as seems just"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-ss.* 1 (*a*), 3.

By the Rent Restrictions Act, 1920, s. 12, sub-s. 3: "Where, for the purpose of determining the standard rent or rateable value of any dwelling-house to which this Act applies, it is necessary to apportion the rent at the date in relation to which the standard rent is to be fixed, or the rateable value of the property in which that dwelling-house is comprised, the county court may, on application by either party, make such apportionment as seems just, and the decision of the Court as to the amount to be apportioned to the dwelling-house shall be final and conclusive":—

Held, that this provision does not enable the county court when apportioning the rent to take into account the fact that the landlord pays the rates, or that the tenant enjoys gas, water, telephone, or other amenities at the landlord's expense. In making the apportionment the county court can only consider the size, accessibility, aspect, and other physical advantages enjoyed by the tenant of the dwelling-house in respect of which the standard rent is to be ascertained, as compared with those of the rest of the property in which it is comprised.

Appeal from Lambeth County Court.

On August 3, 1914, a dwelling-house at No. 25 Crystal Palace Road, London, S.E., was let at a rent of 30*l.* a year in addition to rates and taxes. The lessee of this house had since August 3, 1914, sub-let three rooms in it to the appellant as tenant at an inclusive rent of 14*s.* per week. The tenant afterwards applied to the county court under s. 12, sub-s. 3, of the Increase of Rent, &c. (Restrictions), Act, 1920, for an apportionment; he also claimed the return of 11*l.* 4*s.* alleged to have been paid in excess of the amount of rent allowed by the Act. The tenant argued that the rent to be apportioned was 30*l.*, being the standard rent of the dwelling-house under s. 12, sub-s. 1 (*a*) (1), and that no account was to be taken of rates, light, water, or other

(1) Increase of Rent, &c. (Restrictions), Act, 1920 (10 & 11 Geo. 5, c. 17), s. 12, sub-s. 1 (*a*): "The expression 'standard rent' means the rent at which the dwelling-house was let on August 3, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said August 3, the rent at which it was first let."

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amenities paid for by the landlord of which the tenant had the advantage. The county court judge held that the tenant was entitled to apportionment, but that in apportioning a standard rent, where the tenant paid a rent which included rates, water, gas or other services, all services and amenities which the tenant enjoyed must be taken into account; and that apportionment was not to be made by a mere calculation based on the cubic area of the rooms used, irrespective of their situation and the amenities attached to them. He so regarded the direction in s. 12, sub-s. 3 (1), of the Act of 1920 that the county court should "make such apportionment as seems just." He found that the standard rent was 30*l.*, and directed the registrar to apportion this rent in accordance with the above principles.

The tenant appealed.

J. Duncan for the tenant. The county court judge has no power in making an apportionment to take into account the fact that the landlord pays all rates and taxes and that the tenant enjoys other amenities at the landlord's expense. The words "as seems just" in s. 12, sub-s. 3, refer to the words that have just preceded them—namely, to the apportionment of the money value of the rent or rateable value of the comprising property. They only enable consideration to be given to the size or position of the "dwelling-house" in respect of which a proportionate rent is to be fixed. In fixing the standard rent no regard must be had to collateral considerations: *W. H. Brakspear & Sons* v. *Barton* (2); judgment of McCardie J. in *Glossop* v. *Ashley*. (3) The same principle applies where apportionment is under consideration, and no power is given in s. 12, sub-s. 3 (1), which is not given in s. 12, sub-s. 1 (*a*). (4)

[SALTER J. If a landlord lets rooms to a tenant, does the Act prevent him from charging for lighting, telephone and rates in addition to the rent allowed under the Act?]

No, subject to the provisions of s. 8, which restrict premiums.

The landlord did not appear.

(1) See Headnote ante, p. 261.
(2) [1924] 2 K. B. 88.
(3) [1921] 2 K. B. 451, 459.
(4) See note (1) ante, p. 261.

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SALTER J. I wish that it were possible to support the decision of the county court judge in this case, as I sympathise with the views which he has expressed, but I fear that the terms of the Rent Restrictions Act, 1920, do not confer the powers which he claims. [His Lordship stated the facts and continued:] The tenant has taken proceedings in the county court, claiming: (1.) an apportionment under s. 12, sub-s. 3, of the Act of 1920, and (2.) a return of rent which he alleges he has paid in excess of the amount allowed to the landlord under the Act. We are only concerned with the former of these proceedings. The county court judge held rightly that the tenant is entitled to apportionment, but the questions remain, upon what principle the apportionment is to be made, and whether the fact that the landlord pays the rates, and that the tenant enjoys the use of lighting, water or telephone at the landlord's expense, is to be taken into account in making such apportionment? If the object of the apportionment were to ascertain what was a fair rent such matters could be considered, but that is not the case. One must read s. 12, sub-s. 1 (*a*), of the Act with s. 12, sub-s. 3, in order to arrive at the true principle. "Standard rent" is defined in s. 12, sub-s. 1 (*a*), and where the applicant's dwelling-house was let as a whole on August 3, 1914, one need look no further: the actual rent is the standard rent. Where, however, as in the present case, the applicant's "dwelling-house" was not let as a whole on August 3, 1914, but only as part of a larger unit, the standard rent of the "dwelling-house" (here the three rooms) can only be ascertained by apportionment of the rent of the comprising property on August 3, 1914. The question is not what rent the tenant ought to pay now, but what was the rent paid by the then tenant to the then landlord for the rooms which now form the applicant's dwelling-house? The rent to be apportioned here—namely, 30*l.*—is "the rent"—not "the standard rent"—of the comprising property. A distinction is made in s. 12, sub-s. 3, between "rent" and "standard rent" referred to in sub-s. 1, because it may be that the comprising property

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Salter J.

is not a dwelling-house, and so the comprising property may have no standard rent. In the present case it is necessary to apportion the actual rent of the comprising property on August 3, 1914—namely, 30*l.* That has to be apportioned "as seems just," that is to say, there must be a fair division of the sum then paid as rent for the whole, so that a proper proportion falls to be paid by the tenant in respect of the rooms now in question. The county court must take into account such matters as the size, accessibility and aspect of the rooms. That is what is meant by the words "as seems just" in s. 12, sub-s. 3. The rent of 30*l.* must be apportioned on these principles, so as to find out how much was being paid for these rooms on August 3, 1914.

GREER J. The county court judge has found that the standard rent of the whole dwelling-house was 30*l.* a year, and that finding is unchallenged. I am not clear that this is necessarily the rent which is to be apportioned. The cases cited in argument show that in ascertaining the standard rent one must disregard collateral matters, such as the payment of rates by the landlord; but the Act of 1920, s. 12, sub-s. 3, which deals with apportionment, speaks of "the rent" and not of "the standard rent." If, however, it is assumed that "the rent" is here the same as the standard rent, then it is the duty of the county court to apportion it in accordance with the physical advantages to which Salter J. has referred—namely, those enjoyed by the tenant in respect of his dwelling-house as compared with those of the rest of the property in which it is comprised. For these reasons I think that the judgment cannot stand and that the case must be remitted.

Appeal allowed and case remitted.

Solicitors for tenant: *Nimmo & Harvey.*

F. P. F.

THE KING *v.* GOVERNOR OF MAIDSTONE PRISON. *Ex parte* MAGUIRE.

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April 21, 22.

Habeas corpus—Applicant sentenced to Penal Servitude in Northern Ireland —Removal to English Prison—Penal Servitude Act, 1853 (16 & 17 *Vict. c.* 99), *ss.* 6, 8.

A convict sentenced to penal servitude in Northern Ireland can be lawfully transferred to an English prison.

Even assuming that the order of transfer was not valid to justify the transfer over the latter part of the route between the Irish and the English prisons, it is a sufficient answer, under s. 6 of the Penal Servitude Act, 1853, by the governor of the English prison, to whom a rule nisi for a writ of habeas corpus has been directed, that the applicant was lawfully sentenced to a term of penal servitude, which is still current, and that he detains him under an order lawfully made by the Home Secretary.

RULE NISI for habeas corpus.

On January 4, 1923, the applicant, Joseph John Maguire, was convicted at Belfast, under s. 3 of the Explosive Substances Act, 1883 (46 Vict. c. 3), of being in unlawful possession of explosive substances, and was sentenced to four years' penal servitude, and on January 26, 1923, was committed to Belfast Prison. On June 13, 1923, Mr. Bridgeman, then the Home Secretary in England, made an order addressed "To the Governor of Maidstone Convict Prison and all others whom it may concern" by which he "in pursuance of the statutes in such case provided" ordered that Maguire, "at present confined in His Majesty's Prison at Belfast, shall be received into Maidstone Convict Prison and there detained until discharged in due course of law or until further order be made." On June 22, 1923, Lord Chief Justice Henry and Lord Justice Moore, acting in the absence of the Duke of Abercorn, the Governor of Northern Ireland, made an order addressed "To the Governor of Belfast Prison and all others whom it may concern" by which they "under and in pursuance of the statutes in such case made and provided order you to cause [the applicant] to be removed from the above-named prison to Maidstone Convict Prison and there delivered

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to the Governor thereof provided that [the applicant] is in a fit state to be removed." In purported compliance with these orders the applicant was on July 3, 1923, brought to Maidstone Prison, and about the same time the governor of the prison received from the governor of Belfast Prison a certified copy of a warrant or commitment signed by the Clerk of the Crown and Peace for the Northern Ireland Winter Assize County directed to the governor of Belfast Prison directing him to receive the applicant into his custody, he having been sentenced to four years' penal servitude.

It appeared from the affidavit of Stephen George Tallents, C.B., C.B.E., Imperial Secretary to the Governor of Northern Ireland, that on December 9, 1922, His Majesty by letters patent authorized the Governor for the time being of Northern Ireland to execute as regards Northern Ireland all things which belonged to the office of Lord Lieutenant; and also authorized the said Governor to appoint by letters patent such persons as he should think proper as his deputies or justices for the government of Northern Ireland during his absence. By instructions under the Royal Sign Manual dated December 9, 1922, the Governor was commanded not to quit Northern Ireland without leave and without the approval of the persons so to be appointed as deputies, etc. The Duke of Abercorn was appointed Governor on the same date. By warrant under the Royal Sign Manual dated December 29, 1922, the Duke of Abercorn was given leave to be absent from time to time when he considered it necessary for public or private business, and by the same warrant His Majesty approved the appointment (inter alia) of Lord Chief Justice Henry and Lord Justice Moore to act as the Governor's deputies, and by letters patent dated January 9, 1923, the Duke appointed them as his deputies in his absence.

Sir Douglas Hogg A.-G. and *Giveen* showed cause. There is jurisdiction to detain in an English prison a convict sentenced to penal servitude in Northern Ireland. It is true that in the days of transportation separate provisions existed with regard to offenders convicted in Ireland and England:

see the Transportation Act, 1847 (10 & 11 Vict. c. 67), s. 1. The statutes dealing with transportation were consolidated in the Transportation Act, 1824 (5 Geo. 4, c. 84). The Penal Servitude Act, 1853 (16 & 17 Vict. c. 99), while not abolishing transportation, enabled a sentence of penal servitude to be substituted therefor. The Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), by s. 2 abolished the sentence of transportation, and by s. 6 made "transportation" in previous enactments equivalent to "penal servitude." The Acts of 1853 and 1857 applied to the whole of the United Kingdom, including Ireland, and the abolition of transportation involved the abolition of the distinctive treatment of Irish convicts. By s. 6 of the Act of 1853 "Every person . . . . sentenced . . . . to be kept in penal servitude may, during the term of the sentence . . . . be confined in any such prison . . . . in any part of the United Kingdom . . . . as one of [His] Majesty's principal Secretaries of State may from time to time direct. . . . ." The Act applies to the United Kingdom, the applicant had been sentenced to penal servitude in the United Kingdom, and he is confined in a prison in a part of the United Kingdom—namely, England, as directed by the Home Secretary. In fact, until a few weeks ago, there was no convict prison in Ulster. The Restoration of Order in Ireland Act, 1920 (10 & 11 Geo. 5, c. 31), by s. 1, sub-s. 3 (*e*), deals only with conveyance to and detention in prison in the United Kingdom of persons sentenced to imprisonment in Ireland. This shows that the Legislature thought they already possessed the necessary powers in the case of sentences of penal servitude.

[*Reg.* v. *Mount* (1) and *Rex* v. *Lewes Prison* (*Governor*) (2) were referred to.]

Sir Henry Slesser K.C. and *W. A. Robson* in support. By s. 2 of the Convict Prisons (Ireland) Act, 1854 (17 & 18 Vict. c. 76), the Lord Lieutenant of Ireland was the proper imprisoning authority, and it is admitted that the Lords Justices in Northern Ireland were at all material times acting as his successors, and that, consequently, the applicant was properly in their custody. The question is, by what right

(1) (1875) L. R. 6 P. C. 283, 305. (2) [1917] 2 K. B. 254.

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did they part with his body? Their powers are limited by s. 11 of the above Act to conveying him from one prison to another in Ireland and to detaining him in a prison in Ireland, and the Act confers no other power. Notwithstanding this the order of the Lords Justices directs his removal "to Maidstone Convict Prison." No doubt the Penal Servitude Act, 1853, applies to Northern Ireland, but that Act gives the power of removal to the Secretary of State and not to the Lord Lieutenant or his successors, the Lords Justices. Sect. 8 confers on the Lord Lieutenant "all the powers vested under this Act . . . . in one of [His] Majesty's principal Secretaries of State . . . . where such powers are otherwise to be exercised in Ireland." But the order that the applicant be removed to Maidstone Prison is not an order "to be exercised in Ireland." Ulster has its own police administration and for that purpose is not part of the United Kingdom. The Lords Justices, therefore, although they had the right to remove the applicant in Ireland, had none to remove him from Ireland.

The order of the English Home Secretary is only an order to receive, not to transfer; the transfer up to the prison gate is under the Irish order. There is nothing in the Home Secretary's order authorizing the governor of the gaol or any one else to proceed to the coast to receive the applicant, although there might have been. The Home Secretary could not cure the defect by ordering the governor to receive one not in lawful custody.

[SHEARMAN J. But is not the order of the Home Secretary in effect an order to bring from Belfast Prison to Maidstone Prison?]

Nothing in the order says so; the mention of Belfast Prison is merely for purposes of identification.

[AVORY J. The governor of the prison is called on by this rule to show cause why he detains the applicant. Does it matter who brought him there?]

Yes, if it can be shown that he ought not to have been removed from Ireland.

Alternatively, by the effect of the Government of Ireland

Act, 1920 (10 & 11 Geo. 5, c. 67), ss. 3 and 69, and the General Adaptation of Enactments (Northern Ireland) Order, 1921 (Stat. Rules and Orders, 1921, No. 1804, dated November 21, 1921), the executive powers of the Lord Lieutenant are transferred to the Home Secretary for Northern Ireland. The order to transfer the applicant, therefore, should have been made by the latter.

If the above contentions are correct there is no other lawful reason for detaining the applicant. He could not be re-arrested on arriving in England, or extradited, nor taken as an escaped prisoner.

Sir Douglas Hogg A.-G. in reply. The contention that the order of transfer should have been made by the Home Secretary for Northern Ireland involves a complete misreading of s. 8 of the Government of Ireland Act, 1920. Since that Act the Lords Justices as representing the Chief Governor in Northern Ireland represent His Majesty as a constitutional monarch governing on the advice of his responsible ministers in Northern Ireland: see sub-ss. 2 and 3 of s. 8. But in any case, the governor of the prison is only called on to show cause for the detention of the applicant, and he produces the order of the Home Secretary; therefore whether the applicant was lawfully in custody en route to the prison is beside the question.

The contention that if at large the applicant could not have been arrested is entirely dissented from. He would be at large without lawful excuse.

[*Reg.* v. *Mount* (1) was referred to.]

LORD HEWART C.J. This is a rule nisi for a writ of habeas corpus ad subjiciendum directed to the governor of His Majesty's prison at Maidstone to have the body of one Joseph John Maguire before this Court. The ground upon which the rule was granted was that the said governor had detained and is detaining the said Maguire in custody without lawful authority. The question is whether the detention of Maguire in Maidstone Prison is or is not without lawful authority.

(1) L. R. 6 P. C. 283, 305.

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Lord Hewart C.J.

The remedy of habeas corpus, as was said by Lord Watson in *Barnardo* v. *Ford* (1), is "intended to facilitate the release of persons actually detained in unlawful custody."

The facts of the case may be very shortly stated. On January 4, 1923, Maguire was convicted in Belfast for having an explosive substance in his possession unlawfully, and was sentenced to four years' penal servitude. On January 26, 1923, a warrant or commitment was made addressed to the governor of the gaol of the county of Fermanagh. In June, 1923, certain orders were made which had the effect of bringing about the removal of Maguire from the prison in Ireland to the prison at Maidstone, where he now is. The first of those orders was dated June 13, 1923, and was made by Mr. Bridgeman, who at that time was one of His Majesty's principal Secretaries of State; he was in fact Home Secretary. By that document the Home Secretary ordered the governor of Maidstone Prison, and all others whom it might concern, that Maguire, then confined in His Majesty's prison at Belfast, should be received by him into Maidstone Prison, and there detained until discharged in due course of law, or until further order should be made. On June 22, 1923, the Lords Justices of Northern Ireland, acting for and on behalf of the Governor of Northern Ireland in his absence, made an order, addressed to the governor of Belfast Prison and all others whom it might concern, to cause Maguire to be removed from Belfast Prison to Maidstone Prison and there delivered to the governor thereof. In pursuance of these orders Maguire was on July 3, 1923, brought to Maidstone Prison, was there delivered to the governor and has since been detained in that prison accordingly. The question is whether that detention is based on lawful authority or not.

In order to answer that question it is not necessary, I think, to enter upon a survey, however interesting it may be, of the history of transportation and penal servitude. It is not necessary to refer in any detail to the Transportation Act, 1824, or the Custody of Offenders Act, 1847. But in 1853 the Penal Servitude Act, 1853, was passed, and s. 6 of

(1) [1892] A. C. 326, 333.

that statute provided as follows: "Every person who under this Act shall be sentenced or ordered to be kept in penal servitude may, during the term of the sentence or order, be confined in any such prison or place of confinement in any part of the United Kingdom, or in any river, port, or harbour of the United Kingdom, in which persons under sentence or order of transportation may now by law be confined, or in any other prison in the United Kingdom, or in any part of [His] Majesty's dominions beyond the seas, or in any port or harbour thereof, as one of [His] Majesty's principal Secretaries of State may from time to time direct; and such person may during such term be kept to hard labour and otherwise dealt with in all respects as persons sentenced to transportation may now by law be dealt with while so confined." Then s. 7 made the statutes and other provisions concerning convicts sentenced to transportation applicable for the purposes of this Penal Servitude Act, and by s. 8 it was provided that: "All the powers vested under this Act, expressly or by reference to any other Act, in one of [His] Majesty's principal Secretaries of State, shall in relation to places of confinement in Ireland, or where such powers are otherwise to be exercised in Ireland, be exercised by the Lord Lieutenant or other Chief Governor or Governors of Ireland; and where the signature of one of [His] Majesty's principal Secretaries of State would be necessary in relation to the exercise of such powers, the signature of such Lord Lieutenant or Chief Governor or Governors, or his or their Chief Secretary, shall be sufficient in the case of the exercise of such powers by such Lord Lieutenant or Chief Governor or Governors."

In my opinion the provisions of those sections make it clear that the detention which is here complained of is a lawful detention. The Secretary of State in this country and the representatives of the Lord Lieutenant, now the Governor, in Northern Ireland have purported to act and have acted under the powers contained in those sections, and I do not think that there is any substance in the argument that while under the provisions of this Act it is lawful to move

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convicts from one prison to another in England, or from one prison to another in Scotland, or, it may be, from Scotland to England and vice versa, it is not lawful to move convicts from Ireland to England or from England to Ireland. In my opinion that argument ignores the generality of the terms "in any part of the United Kingdom" and "any other prison in the United Kingdom" in s. 6 of the Act of 1853. It is said, however, that in this case, so far as the order made in Ireland is concerned, it was made by the wrong persons. That contention depends upon the provisions of the Government of Ireland Act, 1920, supplemented by certain Orders in Council of 1921, and by an Irish statute, the Ministries of Northern Ireland Act, 1921 [N. I.] (12 Geo. 5, c. 6). The argument is, that as a result of that legislation, and the directions given in pursuance of it, the powers which the Lord Lieutenant formerly had in relation to prisons in Ireland, have been taken away from him, and are now vested in the Secretary for the Home Department in Northern Ireland. It seems to me that that contention is erroneous. It pays too little attention to the words of s. 8, sub-s. 3, of the Government of Ireland Act, 1920, which says: "Subject to the provisions of this Act relating to the Council of Ireland, powers so delegated shall be exercised . . . . (*b*) in Northern Ireland, through "—not by, but through—"such departments as may be established by Act of the Parliament of Northern Ireland, or, subject to any alteration by Act of that Parliament, by the Lord Lieutenant." I think therefore that this order was lawfully and properly made by the Lords Justices as representing the Governor, who, as a result of recent legislation, has taken the place of the Lord Lieutenant. But even if it were otherwise, and even if that part of the argument offered in support of the rule were sound, as I believe it to be unsound, in my opinion it would not matter. This rule is a rule for a habeas corpus directed to the governor of Maidstone Prison. He, at any rate, is entitled to say that Maguire is a person lawfully sentenced to a term of penal servitude, which sentence is still current, and that under an order lawfully made by the

Home Secretary and directed to him, the governor of Maidstone Prison, he detains that convict in custody, and that he is not interested in the formal correctness of any particular step which preceded the arrival of Maguire in this country. I think that would be a sufficient answer. It is not the only answer if my view of the meaning of this legislation be correct, because, as I think, there is no defect, however slight, no informality, however immaterial, in either of these two orders. That being so it is not necessary to have recourse to the kind of reasoning that was employed in the latter part of the judgment in *Reg.* v. *Mount* (1), although if the occasion had been such as to require it, I should have been prepared, speaking for myself, to apply that reasoning to the present case.

I think it is abundantly clear that the detention of this man Maguire is lawful detention, and therefore I think that this rule ought to be discharged.

AVORY J. In view of the judgment delivered by my Lord, in which I entirely concur, I think it only necessary to add that, in my opinion, the record of the conviction of this man and the order made by the Home Secretary for his confinement in Maidstone Prison of themselves are a conclusive answer to the contention that he is not now in lawful custody. But I am also of opinion that there is no substance in the argument that the order made by the Lords Justices in Ireland was beyond their jurisdiction, or without jurisdiction. I think that s. 8 of the Penal Servitude Act, 1853, read with s. 6, gave ample powers to the Lords Justices to make the order which in fact they made, and the two orders taken together clearly authorize the transportation of this prisoner from Ireland to the prison at Maidstone. It is not necessary to decide whether either of these authorities, the Home Secretary in England or the Lord Lieutenant or the Lords Justices in Ireland, might make a complete order for the purpose of transferring Maguire from Ireland to England, although in my view of s. 6, when it once appears that a person has been sentenced to penal servitude, the Secretary of State may from

(1) L. R. 6 P. C. 283.

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AVORY J.

time to time direct that he be confined in any prison in any part of the United Kingdom.

Out of respect to the argument of Sir Henry Slesser I will add one word on his contention that this order made by the Lords Justices was made without any jurisdiction by reason of the provisions of the Convict Prisons (Ireland) Act, 1854. As I understood the argument it was this: The effect of that statute was that the Lord Lieutenant, or the persons who have taken his place in Ireland, could only make orders for the removal of a prisoner in Ireland from one convict prison in Ireland to another convict prison in Ireland, and Sir Henry Slesser relied, for that purpose, upon s. 11 of that Act, which provides that it shall be lawful for the Chief or Under Secretary to direct the removal from and to any convict prison of any convict under sentence or order of transportation or penal servitude who shall appear by the certificate of a medical officer fit to be removed. That undoubtedly gives power to the Chief or Under Secretary, or the person who has taken his place in Ireland, to direct the removal of a prisoner in Ireland from one prison in Ireland to another prison in Ireland. There is nothing in that Act which repeals or restricts the power given by s. 8 of the Penal Servitude Act, 1853, to the Lord Lieutenant or Chief Governor or Governors as the case may be, and therefore in my view the Convict Prisons (Ireland) Act, 1854, has really no bearing on this question. And I entirely agree that the Act of 1920 does not affect this case, because the Lords Justices have exercised, or there is no evidence that they have not exercised, through the Home Department, the powers conferred on them by that Act of 1920. I agree therefore that the rule should be discharged.

SHEARMAN J. I entirely agree. I only wish to say a few words about the argument addressed to us by Sir Henry Slesser, which consisted of a verbal criticism of the two orders put forward by the governor of Maidstone Prison justifying this detention. It has been argued that the order of the Lords Justices, representing the Governor-General, was bad because it ordered the convict to be removed from Belfast Prison to Maidstone Prison and there to be delivered to the

governor of the prison, and that the jurisdiction of the Governor-General, who is the successor of the Lord Lieutenant, did not extend beyond Ireland. I do not think there is much substance in that argument, because, as I read s. 8 of the Penal Servitude Act, 1853, that Act directs him to exercise the powers of dealing with prisoners in Ireland. But assuming that he had no jurisdiction to order Maguire to be transported from or to direct his destination beyond the shores of Ireland, the order is obviously good to the extent that it brings him to the port of embarkation. Then the argument is that the order of the Home Secretary in England, which was the order under which Maguire was received at and is detained in Maidstone Prison, does not say that he should be removed from Ireland but that the convict "at present confined in His Majesty's prison in Belfast, shall be received into Maidstone Convict Prison and there detained until discharged in due course of law." It is said that because the order merely says that the convict is to be received it did not enable the governor of the prison to deal with him until he was presented at the gate of the prison and that, consequently, there was no authority to deal with him from the time he left Ireland till he reached the gate of Maidstone Prison—an argument which I think might be legitimately described as pedantic. In my judgment the fair meaning of the Home Secretary's order is that when his jurisdiction began it empowered all necessary steps to be taken to deliver him to Maidstone Prison. The two orders together form under ss. 6 and 8 of the Act of 1853 a complete justification for the removal from the one prison to the other and for the detention in Maidstone Prison, and I therefore agree that this rule should be discharged.

Rule discharged. (1)

Solicitor showing cause: *The Treasury Solicitor.*

Solicitors in support: *Mills, Lockyer, Church & Evill.*

(1) The applicant appealed against this decision, but the Court of Appeal on June 15, 1925, dismissed the appeal on the ground that it was in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

W. L. L. B.

1925
March 11.

CORDY *v.* GORDON.

Revenue—Income Tax—Wage Earner—Deductions from full Wage for Board, Lodging and Washing—Actual Payment of Balance only—Assessment, whether on full or actual Wage—Income Tax Act, 1918 (8 & 9 *Geo.* 5, c. 40), *Sch. D, Case II., r.* 2 (1.).

The respondent was employed by a county asylums board as caretaker of a farm residence and his wife as nurse there, and each was remunerated by a weekly wage. Under the terms of their employment the respondent was entitled to a salary of 199*l.* 5*s.* a year and his wife to a salary of 160*l.* 15*s.* a year. The institution provided both of them with board, lodging, washing and uniform, and by the rules of the institution and the terms of their employment they had to make payment to the institution for these items. The amount of the payments varied with the cost of living, and was deducted by the institution from the salaries of the respondent and his wife before payment, and the balance only was paid to them :—

Held, that the sums paid in respect of the said items provided for the respondent and his wife were part of "the actual amount of their wages" as weekly wage earners within the meaning of the Income Tax Act, 1918, Sch. D, Case II., r. 2 (1.), and should be included in the amount at which the respondent was assessable to income tax under that Schedule in respect of the incomes of himself and his wife.

CASE stated by the Commissioners for the General Purposes of the Income Tax Acts.

The respondent, Thomas Gordon, was employed by the West Riding of Yorkshire Asylums Board as caretaker of the farm residence at Menston Asylum, Menston, in the county of York, and his wife, Emily Gordon, as nurse at the same institution, and each was remunerated by a weekly wage. The respondent was first engaged at the asylum in 1895, and he then signed an agreement by which (inter alia) he promised to obey the rules of the asylum; stated that he understood his engagement to be monthly, and that he agreed to give a month's notice should he wish to give up his situation, but acknowledged that he was liable to dismissal without warning for acts of unkindness to the inmates, intemperance, disobedience to orders, or any transgression of the rules; and agreed in consideration of the salary, wages or allowances to be paid to him to relinquish and give up all claim to

superannuation allowance or pension on retirement, except if whilst in the actual execution of his duty he should be injured by a patient or otherwise, and also agreed to be bound by a resolution of the West Riding Asylums Committee that every officer, nurse or servant should be required to enter into an agreement to that effect. Similar conditions applied to the employment and remuneration of the respondent and his wife, except as to amount of remuneration. Neither the respondent nor his wife had any written agreement with the said board as to salary or the conditions of their employment. Under the terms of his employment the respondent was entitled to a salary of 199*l.* 5*s.* per annum and his wife to a salary of 160*l.* 15*s.* per annum. The said institution provided the respondent and his wife with board, lodging, washing and uniform, and the respondent with suppers. By the rules of the institution and the terms of their employment the respondent and his wife had to make payment to the institution in respect of these items. The amount of the payments for these items was calculated on a scale which varied with the cost of living. The respondent admitted that the superannuation contributions both of himself and his wife were calculated on the basis of gross remuneration and not on that of the sum actually received, and that the amount of each quarterly assessment was in accordance with the sums shown on the official return of wages paid to employees made to the appellant by the clerk of the asylum.

For the year ended April 5, 1922, the amount of wages paid by quarterly instalments to the respondent was 199*l.* 5*s.*, and to his wife 160*l.* 15*s.*, making a total remuneration to both of 360*l.* per annum. During the said year, in respect of the items provided by the institution as above mentioned, the respondent paid 52*l.* 13*s.* 8*d.* and his wife 54*l.* 16*s.* 10*d.* These amounts were deducted by the institution from the respective salaries before payment and the balance only paid to the respondent and his wife.

For the said year the respondent was assessed by quarterly assessments under the Income Tax Act, 1918, Sch. D, Case II.,

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r. 2 (1.) (1), in respect of the said sum of 360*l.*, as being his own and his wife's earnings as weekly wage earners.

The respondent appealed to the Commissioners against the assessment. The appellant, an inspector of taxes, representing the Inland Revenue, opposed the appeal.

The Commissioners were of opinion that the amounts not actually received in cash by the respondent and his wife were not assessable, and they reduced the assessment accordingly.

Sir T. Inskip S.-G. and *R. P. Hills* for the appellant. The respondent was properly assessed to income tax under the Income Tax Act, 1918, Sch. D, Case II., r. 2 (1.) (1), on the full amount of the wages of himself and his wife, and the sums applied towards the board, lodging and other items provided by the institution ought not to be deducted.

It clearly appears from the facts of the case that the sums applied in payment of these items were part of the wages of the respondent and his wife and were not to be deducted. According to the terms of employment of the respondent and his wife, as set forth in the case stated, each of them is entitled to a "salary" which includes the sums paid for these items, and there is no express provision that these sums are to be deducted from the salaries. It is true that these sums

(1) The Income Tax Act, 1918, provides:—

"SCHEDULE D.

"1. Tax under this Schedule shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing— . . . .

(ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation. . . . .

"2. Tax under this Schedule shall be charged under the following cases; that is to say,— . . . .

"Case II.: Tax in respect of any profession, employment or vocation not contained in any other Schedule; . . . .

"Rules applicable to Cases I. and II.

"1. (1.) The tax shall be charged without any other deduction than is by this Act allowed. . . . .

"2. (1.) Weekly wage earners shall be assessed and charged to tax in respect of their wages in each quarter of the year instead of in the whole year, and shall in all cases be assessed and charged in respect of the actual amount of their wages for that quarter, and as respects any such assessment and charge and the collection of the tax the provisions of this Act shall have effect as if tax were charged for each quarter instead of for the year."

were not handed to the respondent and his wife in money, but were spent in paying for the advantages received by them; but it has been clearly laid down by the decided cases that in order that a sum may form part of a person's income for purposes of taxation it is immaterial that he does not receive it in actual cash provided he receives it in things which have a cash value, and it is also immaterial to what particular object the sum is applied for his benefit. On the analogy of the decided cases the sums in question formed part of the incomes of the recipients. In *Hudson* v. *Gribble*, *Bell* v. *Gribble* (1) it was held that sums deducted by a municipal corporation from the salaries of its officers as contributions to a superannuation scheme formed part of the salaries, and could not be deducted therefrom for the purpose of assessment under Sch. E. In *Bruce* v. *Hatton* (2) it was held that a sum deducted from the salary of the principal of a college as a contribution under the superannuation scheme of the college, which he had voluntarily joined, formed part of his income and was taxable. Similarly in *Smyth* v. *Stretton* (3) it was held that a sum which was not at once paid to, but merely placed to the credit of, a master in a college under a provident scheme was a taxable addition to his income. In *Fergusson* v. *Noble* (4) an allowance to a police officer for clothing was held to be assessable. In *North British Ry. Co.* v. *Scott* (5), where a railway company paid the salaries of its officials without deduction of income tax, and afterwards paid income tax in respect of the salaries, it was held that the amount so paid as income tax should be reckoned as part of the officials' income, inasmuch as, although they did not receive it in money, they had the advantage of it.

In the case of *Tennant* v. *Smith* (6) it was no doubt held that in estimating for purposes of taxation the income of a bank agent, the yearly value of his privilege of free residence in the bank house could not be brought into account. That

(1) [1903] 1 K. B. 517.
(2) (1921) 8 Tax Cas. 180.
(3) (1904) 5 Tax Cas. 36.
(4) (1919) 7 Tax Cas. 176; 1919, 2 S. L. T. 49.
(5) [1923] A. C. 37.
(6) [1892] A. C. 150.

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case, however, is distinguishable from the present, because there the agent occupied the premises not primarily for his own benefit but for that of the bank. In that case, although the claim to duty purported to be made under both Schs. D and E, the decision was under the latter Schedule. Lord Halsbury L.C. there said, that although he regarded the statute as referring to money payments, he did not deny that if things of money value were capable of being turned into money they might be taxable.

Hon. Geoffrey Lawrence K.C. and *Dallas Waters* for the respondent. The respondent should not be assessed to income tax under Sch. D, Case II., r. 2 (1.) (1), or otherwise, on the full salaries of himself and his wife, but the sums applied to payment of board, lodging and the other items should be deducted.

It appears that in fact the sums paid for these items were no part of the wages of the respondent and his wife, but were excepted from them. It is stated in the case that these sums are deducted by the institution from the wages of the respondent and his wife before payment and the balance only paid to them.

The leading case in this department of the law is *Tennant* v. *Smith* (2), where it was held by the House of Lords that in estimating the income of a bank agent for the purpose of assessment under Sch. D (the Schedule here in question) or Sch. E the yearly value of his free residence in the bank premises should not be taken into account. That case established the principle that benefits or perquisites in order to be included for this purpose as part of a person's income must be either paid in money or capable of being turned into money, and that those which were not of either of these descriptions could not be included. Here the things received by the respondent and his wife were not money payable either at once or at a future time, nor were they things which could be turned into money. The recipients have no transferable right to the rooms which they occupy or the uniforms which they wear, and they cannot sell their food. They

(1) See note (1) ante, p. 278.

(2) [1892] A. C. 150.

never have been or will be paid any money in respect of these things. The statement in the case that they have to make payment to the institution in respect of these items is incorrect, and is inconsistent with the subsequent statement that sums in respect of these items are deducted from their salaries before payment. The case should be sent back to the Commissioners to be restated. The only distinction between this case and *Tennant* v. *Smith* (1) is that here the employers have put a money value upon the items in question, but that is immaterial, as the items were neither money nor convertible into money.

The other cases cited are wholly distinguishable from the present case, though consistent with the principle of *Tennant* v. *Smith*. (1) Thus in the cases of *Hudson* v. *Gribble*, *Bell* v. *Gribble* (2); *Bruce* v. *Hatton* (3); and *Smyth* v. *Stretton* (4), the sums deducted from the salaries of the officials or employees as contributions to provident or superannuation schemes were sums which were all along their own property and which they were eventually to receive in money, although payment of the money was postponed for a time; and in *Fergusson* v. *Noble* (5) the sum allowed to the detective officer for the purchase of clothing was paid to him in cash, the clothing which he bought with it became his own property, and provided he bought suitable clothing any balance which remained after payment of the price was his own property. All these cases were decided under Sch. E and not under Sch. D.

Here the respondent does not seek to deduct from the incomes of himself and his wife the amount of their superannuation contributions, as they will eventually receive equivalent amounts in money.

Sir T. Inskip S.-G. in reply. The respondent and his wife received either money or money's worth in respect of the items in question. By the terms of their employment they agreed to accept wages of a specified gross amount, to provide

(1) [1892] A. C. 150.
(2) [1903] 1 K. B. 517.
(3) 8 Tax Cas. 180.
(4) 5 Tax Cas. 36.
(5) 7 Tax Cas. 176; 1919, 2 S. L. T. 49.

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themselves out of these wages with board, lodging and the other items, and to take these conveniences from the institution at current prices. As the cost of living falls their wages rise and vice versa, so that the cost of living is at their own risk. The decision in *Tennant* v. *Smith* (1) is limited to the particular facts of that case. This case is fully and clearly stated, and should not be sent back to the Commissioners to be restated.

ROWLATT J. It is, I think, clear that there are certain settled rules applicable to cases of this kind. If the holder of an office receives a salary in money, and in addition to that salary receives some advantage such as residence, or residence with board and washing, of which he is obliged to avail himself and which he cannot in any case transfer to another for profit to himself, the amount of his income for purposes of taxation is limited to what he receives in cash. That rule is illustrated by the case of *Tennant* v. *Smith* (1), in which it was held that in estimating the income of a bank agent his privilege of free residence in the bank premises could not be brought into account. It is also illustrated by the case of the sea captain, by the case of the domestic servant, and also, I have no doubt, by the cases of many resident schoolmasters, secretaries and others. In these cases the money saved to the employee by the advantage which is given to him in addition to his salary cannot be added to his salary and estimated as part of his income. The reason is, as Mr. Lawrence has pointed out, that in these cases the employee cannot dispose of the advantage so as to turn it into money. If, however, the employee receives a fixed salary plus some advantage which he can dispose of and turn into money, then that principle does not apply, but the advantage which he can turn into money is treated as being money's worth and an accretion to his income.

Where, on the other hand, a person is paid a salary and out of that salary has to pay a counter amount in order to secure for himself some necessaries which he must have,

(1) [1892] A. C. 150.

and which it may be that his employers think he ought to have in a certain form, then it seems to me that there is no relevance in the question whether the advantage which he gets by that counter-payment can be disposed of for money or is inalienable. That question does not arise, because he has been paid a salary, and what he does with the salary is immaterial.

The question here seems to me to be under which of these descriptions the present case falls. I agree that in many cases, perhaps in most cases, the distinction may be a mere matter of words. To say that a man is to be paid a salary of 150*l.* a year with board and lodging worth an additional 50*l.* thrown in, and to say that he is to be paid a salary of 200*l.* a year subject to the deduction of 50*l.* in respect of board and lodging, would be to state the same thing in different terms.

In the present case, however, I think the question is not one of mere words. There is here a distinction showing within which description the case comes. The respondent is paid a gross salary, and out of that salary he has to pay back, in respect of the board, lodging and other items which he is bound to take from his employers, not a fixed sum, but a sum which varies according to the cost of living, so that the cost of living is at his own risk and not at his employers' risk. He is paying for these advantages out of his own money, although he has to take them from a certain provider. In these circumstances it seems to me that the decision of the Commissioners was wrong.

It occurred to me at one time that possibly the respondent got a fixed salary plus lodging, which was liable to a variable deduction in respect of board, and I felt that perhaps I ought to try to find out whether the variation in the cost of living affected the lodging as well as the board. On consideration, however, I think it is unnecessary to go into that. It seems clear enough from the case that what the respondent is getting is a gross salary, and that he has to spend a variable part of it in a particular way—namely, in providing himself with all these items together.

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The true result, therefore, is that the salary is the gross amount received by the employee, and not that the salary is one which varies within limits dependent upon the cost of living.

Appeal allowed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondent: *Pritchard, Englefield & Co., for William Booth, Manchester.*

J. R.

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[IN THE COURT OF APPEAL.]

PRITCHARD *v.* BETTISFIELD COLLIERY, LIMITED.

Workmen's Compensation—Fatal Accident—"Dependants"—"Child" under the Age of Fifteen—"Member of a family"—Illegitimate Grandchild—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 13; *Sch. I., para.* 1 (*a*)—*Workmen's Compensation Act,* 1923 (13 *& 14 Geo.* 5, *c.* 42), *s.* 2.

The Workmen's Compensation Act, 1923, s. 2, provides: "Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent, then: (*a*) if both the widow or other member of the workman's family and such child or children as aforesaid were all wholly dependent on the workman's earnings, there shall, in respect of each such child, be added to and dealt with as part of the compensation payable under para. (1.) (*a*) of the First Schedule to the principal Act, a sum equal to 15 per cent. of the amount" therein mentioned:—

Held, that an illegitimate grandchild (under the age of fifteen) of a workman who meets with a fatal accident in the course of or arising out of his employment is a "child" within the meaning of the section, so as to make increased compensation under the section payable when such illegitimate grandchild is left wholly or partially dependent upon the workman's earnings.

APPEAL from a decision of the judge of the Holywell County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

A workman, Thomas Pritchard, was employed by the respondents as a coal miner and was fatally injured on October 27, 1924, by a fall of the roof in the coal mine while

he was getting coal at the coal face. He died the same day. He was then earning an average wage of over 2*l.* a week.

The workman left a widow, Sarah Pritchard, and an illegitimate grandchild, Mary Elizabeth Pritchard (who was under the age of fifteen), wholly dependent on his earnings. On March 17, 1925, the widow commenced arbitration proceedings, claiming the sum of 361*l.* 4*s.*, being as to the sum of 300*l.* compensation for herself and as to 61*l.* 4*s.* in respect of the increase in compensation granted by s. 2 of the Workmen's Compensation Act, 1923, when a workman leaves a child under the age of fifteen dependent upon him. It was not denied that the widow was entitled to the sum of 300*l.* compensation. The only question was whether any additional compensation was payable under s. 2 of the Act of 1923.

The county court judge held that the additional compensation provided for by s. 2 of the Act was payable in respect of the illegitimate grandchild and awarded the compensation asked for.

The employers appealed.

W. Shakespeare and *R. H. Norris* for the appellants. It is not necessary for the purpose of this appeal to contend that "child" in s. 2 of the Workmen's Compensation Act, 1923, does not include grandchild. In any case it does not include an illegitimate grandchild. An illegitimate grandchild is included in the definition of "dependants" in s. 13 of the Workmen's Compensation Act, 1906, but not in the definition of "member of a family" in the same section. The county court judge has relied on the definition of "dependants," but in s. 2 of the Act of 1923 there is nothing to make that definition applicable. The section commences: "Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen)," and then proceeds to give additional compensation where the workman "in addition, leaves one or more children under the age of fifteen so dependent." In the first instance where the word "child" is used in this section it relates to a child who is a member of the workman's family. This brings in the definition in

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s. 13 of the Act of 1906 of "member of a family," and the definition is limited to legitimate relations. That being so, child must mean "legitimate child or grandchild," and must bear the same meaning in the later part of the section. It follows that an increase of compensation is only allowed under s. 2 to a legitimate "child" "under the age of fifteen so dependent."

[WARRINGTON L.J. The word "child" is not used in the definition of a member of a family. Can you point to any part of the Act of 1906 where it is used except in the definition of "dependants"?]

It is not suggested that there is, but under s. 2 itself "child" as there used would be a person coming within the definition of "member of a family." It is true that under the Act of 1906 compensation was given to dependants who were illegitimate children or grandchildren, but does it follow that the increased compensation given by s. 2 of the Act of 1923 was intended for illegitimate children? It is contended that the section has made it clear that this is not so.

Greaves-Lord K.C. and *O. G. Morris* for the respondent were not called upon.

POLLOCK M.R. This case raises an intricate point as to the construction to be placed upon s. 2 of the Workmen's Compensation Act, 1923. An accident happened to a workman, and unhappily resulted in his death on October 27, 1924. At his death he left totally dependent upon him his widow and a grand-daughter, who was an illegitimate child of his daughter. The Act of 1923, by s. 2, increases the amount of compensation payable on the death of a workman leaving children under the age of fifteen, and the question that arises is whether that increase is available in the case of an illegitimate child, who is left as a dependant, or is only available for legitimate children.

For the purpose of coming to a conclusion I think it is important to consider the precise position in regard to dependants under the Workmen's Compensation Act, 1906. That is the principal Act under which compensation is to be

awarded in the case of an injury to a workman which arises out of and in the course of his employment. In any case where a workman dies and leaves behind him those who are dependent upon him, those dependants are given a right to receive a sum of money for the purpose of compensation. The problem arose: Who is meant by "dependants"? Does this word include persons who are dependent upon the deceased workman, but who, by the misfortune of their birth, are not able to claim legitimacy? The Workmen's Compensation Act, 1906, s. 13, has two relevant definitions. First of all it says that "'dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent." Then it goes on and becomes further inclusive, because the definition continues: "and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings," the word "dependants" "shall include such an illegitimate child and parent or grandparent respectively." It is quite clear from that definition that the Workmen's Compensation Act, 1906, was intended to be inclusive, and to make provision for those who in fact were dependent upon the earnings of the workman who has died in consequence of an accident; and it did not intend to make the right to compensation depend upon legitimacy. It made a provision whereby it was possible for a person to be deemed to be a dependant, although of illegitimate birth.

It is also to be remembered that the test or condition governing the payment of compensation in these cases is that the person to receive a benefit was dependent upon the earnings, then no longer available, of the deceased workman. In the case of an illegitimate child, whose mother had obtained a bastardy order against the father, it might well be that there was a source from which a contribution was being made towards the child's maintenance; but in order to be entitled to receive compensation under the Act an illegitimate child,

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just as a legitimate child, must have been wholly or in part dependent upon those earnings, which are no longer available to support it. Dependency is the essential condition, and when this is borne in mind, it becomes easy to see why the Legislature did not make legitimate or illegitimate birth the test. The next definition to be considered is that of " member of a family," which, according to s. 13 of the Act of 1906, means: " wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, grand-daughter, stepson, stepdaughter, brother, sister, half-brother, half-sister." I have read the whole of the definition, because it is material to notice that it does not contain the term " child " at all.

Now we come to s. 2 of the Workmen's Compensation Act, 1923. That is the Act which amended the Act of 1906, and in s. 2 it provides for an increase of the amount payable on the death of a workman leaving children. It says: " Where a workman leaves a widow or other member of his family "—that is clearly a reference to the definition of " member of a family," which I have just read—" (not being a child under the age of fifteen) "—that is, the member of the family must be over fifteen—" wholly or partially dependent upon his earnings "—that is the first limb of the section—and then it proceeds: " and, in addition, leaves one or more children under the age of fifteen so dependent." It is argued that those words, " and, in addition, leaves one or more children under the age of fifteen," must be controlled by the words " or other member of his family " in the earlier sentence, so that the child or children referred to in the last lines of the portion of the section I have read mean a child, a son or daughter, who is a member of the family, and therefore a legitimate child, a legitimate son or daughter. If so, there would be in favour of the illegitimate child no increase of compensation, and for some reason, which is not easy to follow, it would appear that the system of compensation which applies (whether to legitimate or to illegitimate children) in the Act of 1906, and was intended to be amplified by the Act of 1923, is amplified

only as to those children who can claim legitimate birth. There seems to me to be no logical reason for that curious change, and when the section is carefully considered that does not appear to me to be the right conclusion to come to. It is noticeable that added to the first paragraph of s. 2 of the Act of 1923 you have two alternatives, (*a*) and (*b*), arising in particular circumstances. Those sub-sections begin in this way: "(*a*) If both the widow or other member of the workman's family and such child or children as aforesaid were all wholly dependent" and "(*b*) If the widow or other member of the workman's family or such child or children as aforesaid, or any of them, were partially dependent," but you get the three categories set out in both those alternative provisions—namely, "the widow," the "other member of the workman's family" and "such child or children as aforesaid."

It seems to me therefore to be difficult upon s. 2 alone to come to the conclusion that throughout the section the expression "one or more children" is to be read as controlled by the words "member of the family," so as to introduce the definition of "member of a family" in s. 13 of the Act of 1906 and to confine the additional payment to be made to those who can claim legitimate birth. The intention indicated by the words of s. 2 was to deal first of all with the case of a workman leaving a widow or other member of his family—an expression to be interpreted by reference to the definition of "member of a family" in s. 13 of the earlier Act—and then with the case of a workman who, "in addition, leaves one or more children under the age of fifteen so dependent." I think that those words, "one or more children," have been chosen in order to make the test whether the dependant was a child, and to discard as unnecessary the test whether that child was legitimate or illegitimate. Reading the section in that way, I come to the conclusion that it is intended to increase the amount of compensation for the benefit of all those persons who were actually dependent upon the earnings of the workman who died, and not to make the somewhat illogical restriction that under the later Act only those should benefit who could claim a legitimate birth.

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I have reached this conclusion by looking carefully at the words of s. 2 themselves. But another way of reaching it is, as the learned county court judge did, by reference to the definition of "dependants"; but for my part I prefer to deal with s. 2 on the footing that the first part of it does not govern the subsequent words of the section, and to construe the words "child or children" as intended to be inclusive of all those who in fact are children, whether legitimate or illegitimate.

For the reasons that I have given, I think that the learned county court judge came to the right conclusion, and that the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The learned county court judge has assessed the compensation payable in respect of the fatal injury by accident happening to this workman Pritchard on the footing that he left a widow, and a child under the age of fifteen, wholly or partially dependent upon the workman's earnings—namely, an illegitimate grandchild; and the question which we have to determine is whether the learned county court judge was right in assessing the compensation on the footing that this illegitimate child was a child dependent within the meaning of s. 2 of the Act of 1923.

The Act of 1923 is, by s. 31, sub-s. 2, to be construed as one with the principal Act, the principal Act being the Workmen's Compensation Act, 1906. Sect. 13 of the Act of 1906 contains a definition of the word "dependants." It means such of the members of the workman's family as fulfil certain conditions, which I will come to directly; but I pause to see what is meant by "members of the workman's family," and that is defined in the next paragraph of s. 13. It means "wife or husband, father, mother, grandfather, grandmother, stepfather, stepmother, son, daughter, grandson, grand-daughter, stepson, stepdaughter, brother, sister, half-brother, half-sister." "Dependants" thus means such of that class as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would, but for the incapacity, due to the accident, have been so dependent. The definition of "dependants" goes on in these terms:

" and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include "—that is to say, the word " dependant " shall include—" such an illegitimate child and parent or grandparent respectively." Now it is clear upon that definition that the word " child," as used here, has no reference to parental relationship, but that it merely means a young person, because the workman is described as being the grandparent of a child as well as the parent of a child. " Child " therefore—and I think this was assented to by counsel for the appellants—for the purposes of the Act of 1906, means a young human person.

I now come to the second section of the Act of 1923, which is in these terms: " Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) wholly or partially dependent upon his earnings, and, in addition, leaves one or more children under the age of fifteen so dependent," then certain consequences are to follow, which the learned county court judge has held follow in the present case; and he has assessed the compensation accordingly. I look now to see what is meant by the word " child " in this section. I think it is quite clear that " child " again means young person. It says: " Where a workman leaves a widow or other member of his family (not being a child under the age of fifteen) "; and it must be remembered that the description of " member of family," includes a very large class, so that a brother or sister, or a half-brother or half-sister under the age of fifteen, would be such a child as is referred to in that part of the section. Then it goes on: " and, in addition " —that is to say, in addition to the widow and (if such exist) other member of the family not being a child under the age of fifteen—" leaves one or more children under the age of fifteen so dependent." There again the word " children " means young persons, but any such young person has to be dependent upon the workman's earnings; and

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therefore you have to look back to the definition of "dependants" to see what that means, and you find that if a young person is an illegitimate grandchild, he or she is properly included amongst the persons who are "so dependent." It seems to me to be inevitable that for the purposes of this section—I say nothing about any other section of the Act—the word "children" must mean dependent children, and when you look back to s. 13 of the Act of 1906 to see what dependent children there are, you find that illegitimate children and illegitimate grandchildren are included. I think therefore that the learned county court judge was quite right.

ATKIN L.J. I agree. This is a case that turns upon the meaning of s. 2 of the Act of 1923, which is dealing with the compensation to be paid to dependants, and in the first place it is necessary to bear in mind that the word "dependants" is defined in the Act. I do not wish to repeat the definition that has already been read, but in brief "dependants" means members of the workman's family as defined in the Act, together with an illegitimate child or grandchildren of the workman.

We have to deal with the section relating to an increase of the compensation payable to dependants, and the conditions of an increase are, that the workman shall have left what for the purpose of this case may be called an adult member of his family—and by "adult" I mean over the age of fifteen years—and also shall have left a child, whether that child is a member of his family or is an illegitimate child or grandchild of his. That seems to me, with great respect to the argument which has been addressed to us, to be the plain meaning of the first words of s. 2.

The contention which was put before us was that when the Act of Parliament says: "Leaves a widow or other member of his family (not being a child under the age of fifteen) and, in addition, leaves one or more children under the age of fifteen so dependent," the children under the age of fifteen are meant to be entirely covered by the class which has been excluded from the family. In other words it is said that

"in addition, leaves one or more children under that age so dependent" should be construed as though it read: "In addition leaves one or more children members of his family under the age of fifteen years so dependent." If the Act of Parliament meant to say that it could have said it very clearly, and to my mind would have done so; and the fact that the Legislature has carefully refrained from saying it seems to me to indicate beyond the possibility of a doubt that it did not mean this, and that what it really was providing for was an increase in the compensation that could be devoted to all children under the age of fifteen, dependent or partially dependent upon the workman. It was an increase directed in the interests of childlife, and not in the least directed to the maintenance of family ties or the provision for the legitimate family only. It only extends so far as the children are not of wage earning age, that is, up to the time that they attain the age of fifteen; and if a workman leaves a child under the age of fifteen dependent upon him, whether or not that child is a member of his family, then the increase of compensation is to come into effect. It applies to a boy or a girl under the age of fifteen, and he or she may be a step-son or step-daughter, or half-brother or half-sister, or any of the relationships described under the description "member of family"—or an illegitimate child or grandchild of the workman. I have not the least doubt, on construction, that that is what is meant, and it seems to me that the object of the Act is fairly plain. It was intended to make further provision for the children, without diminishing the provision already made in the former Act for the grown-up dependants.

The result of the contention of the employers in this case would be, I think, remarkable, because it would mean that where a workman left a widow and an illegitimate child or children, the widow would be worse off than where the workman left a widow and one or two legitimate children, because in the former case there would be no right to an increase in compensation, and there would only remain the maximum of 300*l.* to be divided between the dependent widow and illegitimate children. But upon the construction that we are

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putting on the section, the widow would continue to receive the sum of 300*l.*, and there would be a further sum available for the support of the children, whether legitimate or illegitimate.

For these reasons, it appears to me that the construction put upon this section by the learned county court judge was quite right, and that this appeal should be dismissed with costs.

Solicitors: *Barlow, Lyde & Yates, for James, Barton & Kentish, Birmingham; Jaques & Co., for Cyril O. Jones, Wrexham.*

H. C. G.

1925
March 30.

WARWICK *v.* BUTLER AND LAURITZEN.

County Court—Practice—Security for Costs—Defendant not within Twenty Miles of Court—Order of Registrar that Plaintiff give Security—Right of Appeal to Judge—County Court Rules, 1903 *to* 1923, *Order* XII., *r.* 9; *r.* 11, *sub-r.* 8.

Where under the County Court Rules, 1903 to 1923, Order XII., r. 9, the registrar, on the application of a defendant who alleges that he neither resides nor carries on business within twenty miles from the court, makes an order directing the plaintiff to deposit in court a sum of money as security for the costs of the defendant, the county court judge under r. 11, sub-r. 8, has power to vary or rescind the order so made.

Porter v. *London and Manchester Insurance Co.* [1909] 2 K. B. 30 is not now a binding authority.

APPEAL from Southwark County Court.

The plaintiff, Warwick, a labourer, brought an action in the county court against the first defendant, Butler, a contractor, and the second defendant, Lauritzen, a shipowner, resident at Copenhagen, for damages for personal injuries alleged to have been sustained by him while employed by the first defendant in doing work on board the steamship *Bodil*, belonging to the second defendant, while in the Port of London.

On July 16, 1924, the registrar of the county court, pursuant to an application in that behalf by the second

defendant under the County Court Rules, 1903 to 1923, Order XII., r. 9 (1), made an order under that rule directing the plaintiff within three clear days to deposit in court the sum of 30*l.* as security for the costs of the second defendant, Lauritzen, to abide the event of the action on the ground that that defendant did not reside or carry on business within a distance of twenty miles from the court, and directing further that in default of such deposit the action as against that defendant should be struck out. The registrar afterwards extended the time for payment of the deposit sine die with liberty for both parties to apply.

The plaintiff then made an application to the county court judge that the order of the registrar should be rescinded on the ground that the second defendant did carry on business within a distance of twenty miles from the court. On December 16, 1924, the application was heard by the learned judge, who in his note of the proceedings, stated that counsel for the plaintiff submitted that power was given to him (the judge) under Order XII., r. 11, sub-r. 8, to reverse the registrar's order; that counsel for the defendant relied on

(1) The County Court Rules, 1903 to 1923, provide:—

Order XII., r. 9: "(1.) Where a defendant neither resides nor carries on business within a distance of twenty miles from the court in which the plaint is entered, he may make an application to the registrar in accordance with this rule for an order directing the plaintiff to deposit in court a sum of money as security for the costs of the defendant. (3.) The registrar shall duly consider the allegations in the affidavit filed by the defendant or in his affidavit of defence, and may in his discretion either refuse or grant the application."

Rule 11: "(8.) The judge may vary or rescind any order made by the registrar, and may make such order as may be just, and if necessary adjourn the trial."

The former County Court Rules, 1903 and 1904, provided:—

Order XII., r. 9: "Where the residence or place of business of a defendant is more than twenty miles distant from the court in which the plaint is entered, he may, not later than five clear days at least before the return day of the summons thereon, forward by registered post letter to the registrar of such court an affidavit disclosing a good defence upon the merits to the action. The registrar upon receipt of such affidavit, if satisfied that it discloses such a defence, shall forthwith by notice, according to the form in the Appendix, call upon the plaintiff to deposit in court, within two clear days of the date of the notice, such a sum as the registrar may, having reference to all the circumstances of the case, direct. . . . ."

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Porter v. *London and Manchester Insurance Co.* (1); and that he (the judge) refused the plaintiff's application on the ground that under Order XII., r. 9, the registrar's decision was final and could not be reviewed.

The plaintiff gave notice of appeal dated December 17, 1924, that the order of the county court judge should be set aside on the ground that the judge was wrong in law in holding that he had no jurisdiction to rescind or vary the order of the registrar.

H. Bensley Wells (*Theodore Turner* with him) for the plaintiff. The order of the county court judge refusing the plaintiff's application to rescind the order of the registrar directing the plaintiff to give security for the costs of the second defendant should be set aside. The county court judge was wrong in holding that he had no jurisdiction to rescind or vary the order of the registrar. The case of *Porter* v. *London and Manchester Insurance Co.* (1) did not bind him to take that view, as he apparently thought it did. That case was decided under the county court rules in the form in which they then existed—namely, the County Court Rules, 1903 and 1904. Order XII., r. 9 (2), in its then form, provided that a distant defendant might forward by post letter to the registrar an affidavit disclosing a good defence upon the merits, and that the registrar, if satisfied that the affidavit disclosed such a defence, should by notice call upon the plaintiff to deposit such a sum as the registrar might direct. Under the rule in that form the defendant made no application before the registrar, and the registrar might send a notice to the plaintiff, but made no order. In *Porter* v. *London and Manchester Insurance Co.* (1) it was held that in these circumstances the act of the registrar directing the plaintiff to make the deposit was not an "order" within the meaning of Order XII., r. 11, sub-r. 8, and that therefore the judge had no power to vary or rescind it. Since the date of that decision the rules have been materially altered, and in their present form they are the County Court Rules,

(1) [1909] 2 K. B. 30. (2) See note (1) ante, p. 295.

1903 to 1923. Order XII., r. 9, in its present form expressly provides that a distant defendant may make an "application" to the registrar for an "order" directing the plaintiff to make the deposit. That being so the registrar now makes an "order," which under Order XII., r. 11, sub-r. 8, the county court judge has accordingly power to vary or rescind, and the decision referred to is no longer applicable.

G. C. Kingsbury for the defendant Lauritzen. The order of the county court judge refusing the plaintiff's application to rescind the direction of the registrar that the plaintiff should make the deposit was rightly made and should be affirmed. The judge had no jurisdiction to entertain the plaintiff's application. The procedure under Order XII., r. 9, of the County Court Rules, 1903 to 1923, is substantially the same as it was under that rule in its previous form. Under the rule in its present form the distant defendant may still make a wholly informal request of the registrar by letter accompanied by an affidavit without any personal appearance or argument, and the registrar still on consideration of the affidavit either refuses or grants the application, and in the latter case determines the amount of the deposit. The principal change that has been made in the rule has been to substitute for the provision that the registrar, after considering the affidavit, "shall" call upon the plaintiff to make the deposit, a provision that he "may" in his discretion refuse or grant the application, and thus to give to the registrar a wider discretion than he formerly had. Under the rule in its previous form it was held in *Porter* v. *London and Manchester Insurance Co.* (1) that the county court judge had no power to vary or rescind the act of the registrar in calling upon the plaintiff to make the deposit. In view of the extended discretion which the rule in its present form gives to the registrar, there is now even less ground than there formerly was for saying that the judge has power to vary or rescind the order of the registrar, and the decision in the case cited is now of greater authority than when it was first given. In the present case the distant

(1) [1909] 2 K. B. 30.

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defendant resides at Copenhagen, and it would not be reasonable to refuse him security for his expenses of attending the court.

BANKES L.J. This appeal raises a pure question of law as to the construction of Order XII., r. 9, of the County Court Rules, 1903 to 1923, in its existing form. That rule enables a defendant who alleges that he neither resides nor carries on business within twenty miles from the court to make an application to the registrar for an order directing the plaintiff to deposit in court a sum of money as security for the costs of the defendant. In the present case the registrar on the application of the second defendant, who alleges that he does not reside or carry on business within the distance mentioned, made an order directing the plaintiff to deposit a sum as security for the costs of that defendant. The plaintiff desired to challenge that order on the ground that the condition precedent to the due making of it, did not exist. The plaintiff accordingly made an application in the nature of an appeal to the county court judge to have the order of the registrar rescinded. The judge refused the application, holding that he had no jurisdiction to entertain it on the ground that under Order XII., r. 9, the discretion of the registrar was final and could not be reviewed. The learned judge in his note does not expressly state on what authority he based his decision, but he observes that Mr. Kingsbury for the defendant relied on the case of *Porter* v. *London and Manchester Insurance Co.* (1), and Mr. Kingsbury tells us that the judge regarded that case as binding upon him and founded his decision upon it. That case was decided in the year 1909 on the county court rules as they then existed. Since that year, however, certain very material alterations have been made in the provisions of Order XII. relating to the procedure by which a defendant residing and carrying on business at a distance obtains security for costs. One provision of that order has not been altered, but remains the same now as it was in 1909 —namely, r. 11, sub-r. 8, which is: "The judge may vary or

(1) [1909] 2 K. B. 30.

rescind any order made by the registrar, and may make such order as may be just, ..." It is here said on behalf of the plaintiff that the registrar has made an "order" within the meaning of that sub-rule and that the judge has therefore jurisdiction to deal with it. In *Porter* v. *London and Manchester Insurance Co.* (1) it was held by a Divisional Court consisting of Darling and Walton JJ., that the act of the registrar under Order XII., r. 9, in sending the notice calling upon the plaintiff to deposit a sum as security was not an order within the meaning of r. 11, sub-r. 8, and that the county court judge had no power to vary or rescind it. Darling J. came to that conclusion presumably on the ground that under r. 9 as it then existed there was no application by the defendant to the registrar; and Walton J. said in reference to proceedings under that rule: "These are, no doubt, in a sense, interlocutory proceedings, but the granting of leave to the plaintiff, the consideration of the affidavit of the defendant, and the decision on the sufficiency of the defence set up therein and the amount to be deposited in court, these are so many acts of the registrar's discretion, and are not orders within the meaning of Order XII., r. 11, sub-r. 8." (2) After that decision had been pronounced various alterations were made in the terms of r. 9. Unless it had been intended by the framers of the new rule to make the alterations which were suggested in the case cited, it is rather odd that they should have adopted the language in which the rule is now expressed, seeing that in the rule in its original form there was no reference either to an application by the defendant, or to an order by the registrar. In the rule in its newer form both these omissions are supplied, and there are now both an application by the defendant and an order of the registrar. [His Lordship read the relevant part of r. 9 in its present form and continued:] There is thus now under Order XII. a rule —namely, r. 9, which provides for the making of an order by the registrar directing the plaintiff to give security, and also a rule—namely, r. 11, sub-r. 8, which provides that the judge may vary or rescind any order made by the registrar. I

(1) [1909] 2 K. B. 30. (2) Ibid. 35.

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therefore think that under the existing rules it is plain that the county court judge had power to review the order of the registrar. In my opinion this appeal should be allowed, though what the result of this decision may be I do not say.

SCRUTTON L.J. I agree. The procedure under Order XII., r. 9, in its original form was that a distant defendant sent a letter to the registrar with an affidavit disclosing his defence, whereupon the registrar, if satisfied, forthwith by notice called upon the plaintiff to deposit in court such a sum as the registrar directed by way of security for the defendant's costs. In *Porter* v. *London and Manchester Insurance Co.* (1) the Divisional Court held that from the act of the registrar under that rule in its then form no appeal lay to the judge under r. 11, sub-r. 8, because no application was made by the defendant to the registrar, and no order was made by the registrar. After the decision in that case, r. 9 was altered so as to require the making of an application by the defendant and of an order by the registrar. That being so, *Porter* v. *London and Manchester Insurance Co.* (1) is no longer a binding authority. The decision of the registrar is now subject to an appeal to the judge by the plaintiff. I appreciate the point taken on behalf of the defendant, that r. 9 now gives the registrar a wider discretion than it formerly gave him. In its original form it provided that the registrar, if satisfied with the defendant's affidavit, "shall" call upon the plaintiff to make the deposit; but it now provides that the registrar "may" in his discretion refuse or grant the defendant's application. In the present case, however, the question of substance is whether or not the defendant either resides or carries on business within twenty miles from the court. If he does then the registrar has no jurisdiction to require the plaintiff to make the deposit. This court, by allowing the present appeal, is in no way interfering with the discretion of the registrar in cases within his jurisdiction to require the plaintiff to make a deposit

(1) [1909] 2 K. B. 30.

and to fix the amount of the deposit. It is only deciding that under Order XII., r. 9, in its new form, the order of the registrar is subject to an appeal to the judge.

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Appeal allowed.

Solicitors for plaintiff: *Wingfields.*

Solicitors for defendant Lauritzen: *Botterell & Roche.*

J. R.

[IN THE COURT OF APPEAL.]

C. A.

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June 19.

ELLIOTT *v.* BAX-IRONSIDE AND ANOTHER.

Bill of Exchange—Company—Acceptance and Indorsement by Directors—Personal Liability of Directors as Indorsers—Bills of Exchange Act, 1882 (45 *&* 46 *Vict. c.* 61), *s.* 26, *sub-s.* 2.

By s. 26, sub-s. 2, of the Bills of Exchange Act, 1882: "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

A bill of exchange addressed to a limited company was accepted in the following form: "Accepted payable at the W. Bank—A. B. and C. D., directors—Fashions Fair Exhibition, Ld." The drawer when sending the bill to the company for acceptance stated in his letter that as a condition of his doing the work for which the bill was drawn he should require it to be indorsed by the directors as well as accepted by the company. Accordingly the same two directors signed the bill also on the back, "Fashions Fair Exhibition, Ld. A. B. and C. D., directors," and one of them when returning the accepted bill drew attention in his letter to the fact that it was "duly indorsed by two directors of the company as requested by you." In an action against A. B. and C. D. as indorsers of the bill:—

Held, that they were personally liable, upon the ground that if the indorsement was to be treated as that of the company it gave no greater validity to the bill than was already contained in the acceptance, and therefore under s. 26, sub-s. 2, the construction that it was the personal indorsement of the defendants was to be adopted.

Held (by Bankes and Scrutton L.JJ.; Sargant L.J. doubting), that, even if the indorsement stood by itself, as the defendants' signature did not in terms say that they were signing on behalf of the company, the addition to their names of the word "directors" must be treated as a word of description only and not as excluding their liability.

Held, also (by Bankes and Scrutton L.JJ.), that the Court were entitled to look at the surrounding circumstances under which the

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bill was signed, including the letters which passed between the parties on the subject of the indorsement, from which it was to be inferred that the defendants by indorsing intended to guarantee the payment of the bill.

Judgment of Greer J. affirmed.

APPEAL from the judgment of Greer J. at the trial.

The action was against the defendants as indorsers of a bill of exchange. The defendants, Sir Henry Bax-Ironside and R. A. Mason, were directors of a company called the Fashions Fair Exhibitions, Ld., Mason being the managing director. The company was got up for the purpose of holding a fashions exhibition at the White City, Shepherd's Bush, and in January, 1924, an agreement was entered into between the company and the plaintiff that he should erect on their behalf, for the purpose of the said exhibition, certain stalls, showstands, and mannequins' dressing rooms at a price of 2750*l.* Of that price part was to be paid by two bills of exchange for 1000*l.* each, and, as appeared from a minute of a board meeting of the company held on January 31, the company expressly authorized Sir H. Bax-Ironside and Mr. Mason to accept the two bills on the company's behalf. But as the total capital of the company was only 400*l.* the plaintiff was not satisfied with the liability of the company alone, and on February 8, 1924, he wrote a letter to the defendant Mason setting out the terms of the contract, and stating with reference to the two bills of exchange to be given on account of the price: "These drafts are to be indorsed by your company's directors on the back." On the same date Mason wrote acknowledging the receipt of the plaintiff's letter, and adding: "I enclose herewith two drafts for 1000*l.* each, payable on the 4th and 14th March respectively, duly indorsed by two directors of the company as requested by you." No express authority was given by the company to the defendants to indorse the bill on their behalf as well as to accept it. The form of acceptance of the bills was: "Accepted payable at the Westminster Bank, Ld., Piccadilly Branch. H. O. Bax-Ironside, Ronald A. Mason, directors. Fashions Fair Exhibition, Ld." The indorsement

was "Harold H. Elliott. Fashions Fair Exhibitions, Ld. H. O. Bax-Ironside, Ronald A. Mason, directors," the name of the company being in the case of the indorsement affixed by means of a rubber stamp, and in the case of the acceptance being in writing. The action was brought on one of the said bills. The defence was that the indorsement was the indorsement of the company, not of the defendants personally. The defendant Bax-Ironside had not at the time of signing the bill seen the plaintiff's letter of February 8, and stated in his evidence that he had no intention of making himself personally liable on the bill, but he also said that he "signed on the back with the idea of guaranteeing that the company would pay the bill." The defendant Mason admitted that he understood the plaintiff wanted the indorsement to facilitate his discounting the bill with the bank, but he said he did not intend by his signature of the indorsement to become a guarantor that the bill would be met at maturity. The judge held that, as the plaintiff by requiring the indorsement of the two directors showed that he wanted a better security than the bill would provide if it bore nothing more than the acceptance of the company, and as the indorsement, if it was to be treated as the indorsement of the company, would have no effect at all in that respect, he must treat it as the personal indorsement of the defendants, notwithstanding that they signed as directors of the company. He accordingly gave judgment for the plaintiff.

The defendants appealed.

Schiller K.C. and *Willoughby Jardine* for the appellants. The indorsement was that of the company not of the defendants. The case is covered by *Chapman* v. *Smethurst* (1), where it was held that a promissory note, signed "J. H. Smethurst's Laundry and Dye Work, Limited. J. H. Smethurst, managing director," was the note of the company, and that the director signing it was not personally liable, notwithstanding that the note began with the words "I promise to pay." The signature of the note in that case was

(1) [1909] 1 K. B. 927.

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identical in form with that of the indorsement in the present, and that case is an authority that a signature in that form is incapable of being construed as the signature of the directors personally; and it is so for this reason, that the names of the directors are preceded by the signature of the company, here in the form of a rubber stamp, and unless the indorsement is to be treated as the indorsement both of the company and of the directors, which has never been suggested, the names of the directors must be regarded as having been appended, not as those of signatories of the bill, but as of persons authenticating the signature of the company which is already there, and as indicating that they were the persons who did the physical act of putting the company's signature to the bill. It cannot be disputed that the acceptance on the face of the bill was the acceptance of the company, for the bill was addressed to them, and therefore if the defendants' contention is right, it must be conceded that the indorsement creates no further liability than is already contained in the acceptance, but the fact that the indorsement is therefore superfluous is no reason for giving it a construction of which it is in law incapable. The fact that the word "directors" in the indorsement is not preceded by the word "as," nor accompanied by such words as "for or on behalf of the company," is immaterial. It is only where the company have not themselves signed the bill that such additional words are necessary to discharge the directors signing from liability. And that is the distinction between such a case as *Dutton* v. *Marsh* (1) and *Chapman* v. *Smethurst*. (2) In *Dutton* v. *Marsh* (1) the form of the note was: "We, the directors of the —— company, promise to pay," and it was signed in the names of the four defendants without any addition. It was held that in the absence of a statement in the note that they signed only as agents for the company they were personally liable. But there the company never signed the note at all. In *Chapman* v. *Smethurst* (2) and in the present case it did. For this reason the provision of s. 26, sub-s. 1, of the Bills of Exchange Act, that "Where a

(1) (1871) L. R. 6 Q. B. 361. (2) [1909] 1 K. B. 927.

person signs a bill as drawer, indorser or acceptor, ... the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability" has no application to such a case as the present. It was contended for the plaintiff that the intention of the parties, as appearing from the two letters of February 8, was that the defendants should be personally liable as indorsers, but their intention as stated by Kennedy L.J. in *Chapman* v. *Smethurst* (1) "must be gathered from the terms of the document alone." No evidence of anything outside the bill can be effective to alter the form of the signature. It cannot be admitted to contradict the written document. But even if it could it would not be evidence against the defendant Bax-Ironside, for there is nothing to show that he had any notice of those letters before he signed the bill.

Norman Birkett K.C. and *F. A. Holt* for the respondent were not called upon.

BANKES L.J. This is an appeal from Greer J. in an action on a bill of exchange. The defendants, who are sued as indorsers, were the directors of a limited liability company called the Fashions Fair Exhibitions, Ld., and the form of indorsement is this: the name of the company appears on the back of the bill being impressed by a rubber stamp, and underneath there are written the names of the two defendants followed by the word "directors." The defence is that the indorsement is not that of the defendants but of the company, and that the signatures of the defendants were placed on the instrument merely as those of agents for and on behalf of the company. Of course, if those signatures had been followed by some such words as "for the company" or "as directors" the defence would have been established, but here there was nothing but the defendants' names coupled with the statement that they were directors; and it appears to me, as the result of the authorities, that where signatures appear on a bill of exchange or promissory note in that form the word "directors"

(1) [1909] 1 K. B. 927, 930.

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is a word of description only; indeed, I think it might be sufficient to rest the decision of this case on what Cockburn C.J. says upon the subject in *Dutton* v. *Marsh*. (1) There the form of the document was this: "We the directors of the Isle of Man Slate and Flag Company do promise to pay John Dutton the sum of ——*l*.," and then followed four signatures. It also appeared that in a corner of the note the company's seal was affixed and witnessed by another person. The Chief Justice said: "If in this case it had simply"—that is without reference to the materiality of the seal—"stood that the defendants, described as directors but without saying 'on behalf of the company,' signed the promissory note, it is clear that they would have been personally liable, and could not be considered as binding the company."

But I do not rest my judgment upon that, because there are other cases in the books in which it has been suggested that the rule as laid down by Cockburn C.J. is a little wanting in elasticity. I prefer to rest my judgment upon the view taken by Greer J., that if it be assumed that the signatures on the face of the document and on the back are both the signatures of the company, such a construction will render the signature on the back of practically no value whatever; it might just as well not have been there. In such a case s. 26, sub-s. 2, of the Bills of Exchange Act applies, which says: "In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." The construction that the signatures on the back are the personal signatures of the directors is the one which is most favourable to the validity of the instrument in the hands of a holder.

But I go further, and I think that for the purpose of construing the indorsement it is permissible to take into consideration the circumstances under which it was made, and the cases of *Macdonald* v. *Whitfield* (2) and *McDonald & Co.* v. *Nash*

(1) L. R. 6 Q. B. 361, 364. (2) (1883) 8 App. Cas. 733.

& Co. (1) seem to me to be authorities for that proposition. The circumstances in which the indorsement was written were that the plaintiff refused to enter into the transaction except upon the terms, which he made perfectly plain in his letter to Mason of February 8, that the bill was "to be indorsed by your company's directors on the back." It is true that there was no evidence that the defendant Bax-Ironside ever saw that letter or Mason's reply to it, but he must have been perfectly well aware of the terms stipulated for by the plaintiff, because he admitted in his evidence that he "signed on the back in the idea of guaranteeing that the company would pay the bill"; and his conflicting statement that he "would not sign if there was to be personal liability" presumably meant nothing more than that he did not expect that he would ever be called upon to pay, as it was assumed that there would be considerable profits accruing to the company out of which the bill would be met. This appeal must be dismissed.

SCRUTTON L.J. I have come to the same conclusion. Where a person puts his name on a bill with an addition there are two classes of cases into which the addition may fall. It may be such as to show that he is contracting as agent for another, putting his name on the bill only as agent and excluding his personal liability. Where a man signs "for and on behalf of Jones as agent" he is clearly not undertaking any personal liability, but is purporting to make Jones liable. It is otherwise where the man puts after his signature a description for the purpose merely of showing who he is and how he came to sign. Thus in a case where money had been lent to a parish and the churchwardens signed a note for the amount "P. and W., Churchwardens," they were held personally liable on the note as makers (2), for the description of themselves as churchwardens did not mean that they were signing as agents for the parish and took no personal liability, but was merely an explanation of

(1) [1924] A. C. 625. (2) *Rew* v. *Pettet* (1834) 1 Ad. & E. 196.

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how they came to put their names on the note. In an early case, *Leadbitter* v. *Farrow* (1), Lord Ellenborough expressed himself in this way: "Is it not an universal rule that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly 'I am the mere scribe,' he becomes liable." The language of Cockburn C.J. in *Dutton* v. *Marsh* (2) is to the same effect. He there says: "The effect of the authorities is clearly this, that where parties in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account or on behalf of those whom they might otherwise be considered as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But, on the other hand, if they state that they are signing the note or the acceptance on account of or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus* v. *Melrose* (3) fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented." Those cases were before the Bills of Exchange Act, and when Parliament came to codify and to some extent alter the law in that Act, they did so in this way. Sect. 26, sub-s. 1, provided that: "Where a person signs a bill as drawer, indorser or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon: but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability." And by sub-s. 2: "In determining whether a signature on a bill is that of the principal or that

(1) (1816) 5 M. & S. 345, 349. (2) L. R. 6 Q. B. 361, 364.
(3) (1858) 3 H. & N. 177.

of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." Now the particular instrument with which we have to deal is accepted by two directors with the name of the company following their signatures, and on its back is an indorsement of the names of the same two directors, describing themselves as directors, with the name of the company stamped above theirs. If that acceptance and indorsement are to be construed in the same way the indorsement is valueless. A man who is already an acceptor of a bill adds nothing to its value by indorsing it. If, on the other hand, after the company has accepted the bill, two directors put their names on it as indorsers for the purpose of giving the holder their personal guarantee, the indorsement does give an additional value to the bill, and for that reason it is a matter of every day commercial experience to find a bill accepted by a company and indorsed by the directors. That being so, if this bill is to be regarded as ambiguous and capable of either construction, s. 26, sub-s. 2, of the Bills of Exchange Act applies, with the result that the construction of the indorsement as the personal indorsement of the directors is the one which must be adopted as most favourable to the validity of the bill.

But I go somewhat further. A Court which is called upon to construe a document is not for that purpose restricted to the perusal of the particular document itself. As is said in Taylor on Evidence, § 1148: "While the controversy is between the original parties, or their representatives, all contemporaneous writings relating to the same subject matter are admissible in evidence, provided only that they be of equal solemnity with the principal document, and that no oral testimony be required for the purpose of connecting them therewith." Now here I find that on February 8 the plaintiff sent to the company for acceptance two drafts, one of which was that now sued upon, enclosed in a letter, in which he insisted that: "These drafts are to be indorsed by your company's directors on the back"; and the defendant Mason, when returning the

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acceptances on the same date, wrote: "I enclose herewith two drafts, ... duly signed by two directors as requested by you," therein referring to the indorsements. I think I am entitled to take those letters into consideration, as tending to show that the defendants were undertaking personal liability when putting their signatures on the back. Indeed, Sir H. Bax-Ironside admitted that when he wrote his name on the back he did so because he thought he was guaranteeing the bill. For these reasons I agree with the judgment of Greer J.

SARGANT L.J. I am of the same opinion. I prefer to found my judgment solely on the contents of this particular bill, for on the question whether extraneous evidence is admissible to show whether these two persons were signing as agents of the company or in their individual capacity I entertain some doubt. But, looking at the instrument by itself, I think the decision of the learned judge and the grounds on which he rested it are right. It seems quite clear that in the case of the signature to the acceptance the defendants were signing on behalf of the company and not in their individual capacity, and for this reason, namely, that the bill was addressed to the company, showing that it was the company and the company alone that was intended to accept it. That being so there is found on the back of the bill this indorsement: "Fashions Fair Exhibitions, Ld., H. L. Bax-Ironside, Harold A. Mason, directors." Now if that indorsement stood alone with nothing else to lead me to a different conclusion I should be rather inclined to think that it was an indorsement of the company and not the personal indorsement of the individual directors. But when you find that it is an indorsement to an instrument on the face of which there is an already existing liability of the company, to which no addition would be made by the indorsement if it is to be treated as the indorsement of the company, and as it is obvious that the indorsement was put there for the purpose of creating an additional liability, the necessary inference is that it was intended to create a liability of the individual

directors, and in that connection I agree with what has been said as to the effect of s. 26, sub-s. 2, of the Bills of Exchange Act, 1882.

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Appeal dismissed.

Solicitors for the appellants: *Sutton, Ommanney & Oliver.*
Solicitors for the respondents: *Cohen, Dunn & Co.*

J. F. C.

[IN THE COURT OF APPEAL.]

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SHARPE *v.* SOUTHERN RAILWAY.

Negligence—Railway Company—Invitation to Passenger to alight—Contributory Negligence of Passenger.

The plaintiff was a passenger on the defendants' railway to G. by a train which arrived at that station while it was still daylight. Owing to the train being too long for the platform at G., upon its arrival there the hindmost carriage, in which the plaintiff was, stopped short of the platform. A porter shouted to the passengers to keep their seats, but the plaintiff, who was asleep, did not hear him. On waking the plaintiff realized that he was at G. station, and, fearing that he might be carried on, got out in a hurry without looking to see what he was stepping on. There being a drop of five feet from the carriage floor to the ground, he fell and was injured:—

Held, that, even if under the circumstances the defendants were negligent, of which the Court thought there was no evidence, the plaintiff's act in getting out without looking where he was going was contributory negligence, and the defendants were not responsible.

London, Tilbury and Southend Ry. Co. v. *Glasscock* (1902) 19 Times L. R. 305 distinguished as a decision on special circumstances.

APPEAL of the defendant railway company from the verdict and judgment at the trial before Horridge J. and a jury.

The plaintiff, Captain W. C. Sharpe, was on October 12, 1923, a passenger by a train from Waterloo, which arrived at Guildford at 5.31 P.M., at a time when it was still daylight. He was going to Baynards, a station a little distance the other side of Guildford, and he had to change at Guildford. He travelled in the rearmost coach of the train, and in his compartment there were three other passengers. In the course of his journey he fell asleep. The train was too

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long to allow of all the carriages being drawn up alongside of the Guildford platform at the same time, and on the arrival of the train at Guildford the plaintiff's carriage was stopped some distance short of the platform. A porter, whose duty it was to give warning in such circumstances, shouted: "Keep your seats. We shall pull up in half a minute." He shouted sufficiently loud to have been heard by the plaintiff if he had been awake, but as he was asleep he did not hear him. Notwithstanding the warning to stay where they were the plaintiff's three fellow passengers got out, but managed to do so safely. The last of the three called out to the plaintiff to take care how he got down, as the rails were slippery, but there was no evidence that the plaintiff heard him. The plaintiff woke up, and found the door of his carriage open and his fellow passengers gone. He was somewhat confused, but, realizing that he was at Guildford station and fearing that he might be carried on, he got out hurriedly. He had occasionally travelled through Guildford station, but he was not familiar with it. The floor of the carriage was at that point five feet above the level of the ground. He fell and broke his leg. The action was brought to recover damages for the injury sustained, which was alleged to be due to the negligence of the defendants in inviting the plaintiff to alight at a place where it was dangerous to do so. Horridge J. directed the jury that the act of stopping a train at a station is, in the absence of a proper warning, an invitation to those passengers whose destination that station is to get out, and, as it appeared that according to the regulations of the company it was the porter's duty to shout the warning from the permanent way alongside each coach of the overlapping portion of the train in turn, and that he contented himself with shouting it only from the end of the platform, he left it to the jury to say whether the warning was sufficient. He also left it to them to say whether the plaintiff was guilty of a want of reasonable care in getting out without first looking to see where he was going. The jury found that the defendants were negligent and that the plaintiff was not, and awarded damages 1500*l*. The

defendants appealed on the ground that there was no evidence on which the jury could find negligence on the part of the defendants, or absence of contributory negligence on the part of the plaintiff, and that the judge ought to have withdrawn the case from the jury on both issues.

Schiller K.C. and *Hon. S. Henn Collins* for the appellants.

J. B. Matthews K.C. and *J. B. Melville* for the respondent.

[The following cases were cited: *Praeger* v. *Bristol and Exeter Ry. Co.* (1); *Glasscock* v. *London, Tilbury and Southend Ry. Co.* (2); *Cockle* v. *London and South Eastern Ry. Co.* (3); *Grand Trunk Ry. Co.* v. *McAlpine* (4); *Bridges* v. *North London Ry. Co.* (5); *Weller* v. *London, Brighton, &c., Ry. Co.* (6); *Robson* v. *North Eastern Ry. Co.* (7); and *Rose* v. *North Eastern Ry. Co.* (8)]

BANKES L.J. This is one of a numerous class of cases where an accident has happened as the result of a passenger by train alighting from a carriage which has overshot or stopped short of the platform, or has stopped in front of a part of the platform which, by reason of its sloping downward or being bevelled off so as to leave a space between the platform and the carriage, is a dangerous spot at which to alight. In order to establish a cause of action in such cases the plaintiff has to show that the railway company gave him an invitation to alight at that spot under circumstances which made it negligent in them to give it. It would be dangerous to attempt to lay down any rule of universal application as to what amounts to an implied invitation to alight, for it must depend upon the particular circumstances of each case. Here, however, no such question arises, for the case for the company is that not only was there no invitation, but there was an express warning not to alight, and the only matter

(1) (1871) 24 L. T. 105.
(2) (1902) 18 Times L. R. 295; 19 Times L. R. 305.
(3) (1872) L. R. 7 C. P. 321
(4) [1913] A. C. 838.
(5) (1871) L. R. 6 Q. B. 377; L. R. 7 H. L. 213.
(6) (1874) L. R. 9 C. P. 126.
(7) (1875) L. R. 10 Q. B. 271; (1876) 2 Q. B. D. 85.
(8) (1876) 2 Ex. D. 248.

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for consideration was whether that warning was sufficient. [His Lordship then proceeded to discuss the evidence, and came to the conclusion that, on the uncontradicted evidence of the defendants' witnesses, the warning to the passengers not to leave their seats was amply sufficient to reach the ears of a passenger in that portion of the train in which the plaintiff was, provided he was awake and reasonably alert, and that under the circumstances there was no evidence on which the jury could have found that the company were negligent in that respect.] But even assuming that the warning was insufficient, it seems abundantly clear upon the evidence that the company's negligence was not the cause of the accident, and the plaintiff in getting out without looking to see where he was going was the cause of his own misfortune. The only difficulty that I have felt upon that question arises in consequence of the decision of the House of Lords in *London, Tilbury and Southend Ry. Co.* v. *Glasscock.* (1) It must be conceded that the degree of care which a passenger ought to take in alighting after receiving an invitation to alight must depend on the circumstances of the particular case. Let me give an illustration. Suppose a passenger who travels on the Underground Railway between two stations, say the Temple and Victoria, knows as a fact that the platforms at those stations are so made that they are practically on a level with the footboards of the carriages, and that because of that knowledge there is no necessity for him on getting out to look down to see where the platform is; under such circumstances he is entitled to assume that the platform will be in its normal condition, and if in consequence of its in fact being temporarily in an abnormal condition the passenger is injured, it cannot reasonably be imputed to him that his omission to look at what he was going to step on to was negligence contributing injury. On the other hand, the position of a passenger arriving at a country railway station with which he is not familiar is very different, because he has no previous knowledge of the distance from the floor of the carriage to the ground,

(1) 19 Times L. R. 305.

and his first duty, therefore, before alighting is to see how far it is, as no man can safely step into space. The plaintiff in the present case was not in the position of the plaintiff in *Glasscock's Case* (1), for he was not a person who was familiar with Guildford station, and he knew nothing about the position relatively to the platform at which the hindmost coach of the train was usually drawn up. The jury in *Glasscock's Case* (1) found that, although the plaintiff could have avoided the injury by looking before she stepped off the footboard, she was not guilty of negligence in omitting to do so. It was upon the question whether there was evidence upon which the jury could so find that the decisions of the Court of Appeal and of the House of Lords in that case turned. The judgments of the Court of Appeal are set out at length in the Appendix to the case on appeal to the House of Lords. Collins M.R. said: "This lady is shown to have been thoroughly familiar with the conditions of the Shoeburyness Station. She had been in it often. It is perfectly possible for people to travel every day on a railway and arrive at a station without knowing where exactly the platform ends, and where it narrows off or recedes from the train. The two things are perfectly compatible, but the fact that she went every day to the station is, I think, important on this point: that she would know it was a terminus, and that she would know that the object of the train in drawing up at that terminus was that she should get out; and from her habit of knowledge of what the railway company did she would, under the circumstances, being in a train which came to a final standpoint, be in the same condition as any person who, not being familiar with it, heard the name of a station called out when the train stopped and so might be treated as having an invitation to alight." The Master of the Rolls then went on to point out that in the absence of a warning, which was never given, to keep her seat until the train had been put in a safe position, the invitation so given to alight was a negligent act, and added: "Having regard to what they (the jury) knew of

(1) 19 Times L. R. 305.

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the plaintiff's experience of this platform, drawing, as they did draw, undoubtedly, the inference that she thought things were normal, and got out under those conditions, they thought that did not fasten upon her the responsibility of looking, not where she went in the sense of jumping on to a man walking up in front, as Mr. Colam puts it, but not looking down and picking her steps in doing an ordinary act which she had done over and over again before, and which involved no special care." He concluded: "I cannot affirm as a matter of law that the fact that she did not look amounts to such contributory negligence on her part as to defeat her right to retain the verdict." And Romer L.J. said: "There was evidence to show that the plaintiff did not alight from this train hurriedly or precipitately. She knew, and she was entitled to believe that the train had arrived at the terminal station at which all passengers would have to alight. She did not hurry herself. She appears to have acted with such deliberation as passengers acting with reasonable care ought to act with when a train arrives at a station at which they have to alight. She looked out. She must have looked out. She says herself she saw the platform. That is to say she could see she was at the terminus. She saw other passengers alighting, and they were alighting before she descended. She had every reason to believe she was at the platform, and that the platform was in its normal condition, that is for the purpose of passengers alighting." What I think the Lords Justices there meant is what I endeavoured to indicate by my illustration of the passenger on the Underground Railway. There an invitation to alight is given to persons who have full knowledge of the particular station, and have a right to assume that, if they are invited to alight at that station, it will be in the condition in which they know it normally to be, and in those circumstances it is open to the jury to say that their stepping out without first looking down is not an act of negligence on their part. But there is nothing of that kind here. The present plaintiff is not in the position of the lady in *Glasscock's Case* (1), and

(1) 19 Times L. R. 305.

I do not think there was any evidence on which, even assuming that there was an invitation to alight, the jury were justified in finding that he was not negligent in omitting to look before he stepped out, or that he could not have avoided the accident by the exercise of reasonable care. In my opinion the case ought to have been withdrawn from the jury.

SCRUTTON L.J. I have carefully read through the judge's notes, and the shorthand notes of the evidence in this case, and listened to the arguments of counsel, and have come to the conclusion that the judge ought at the end of the plaintiff's case, and still more at the end of the defendants' case, to have withdrawn the case from the jury. The facts were that the plaintiff, who was living at a place called Baynards, which is beyond Guildford, travelled by the 4.50 train from Waterloo, which involved his changing at Guildford. The train was a long one, too long for the Guildford platform, and when it stopped at Guildford the rear coach in which the plaintiff was remained a considerable distance short of the platform. In answer to a suggestion in cross-examination that a porter had shouted to the passengers in the back carriages to keep their seats until the train drew up, the plaintiff said that he did not hear him, as he had been asleep. He woke up suddenly to find himself with the door open and his fellow passengers gone. He was not quite sure where he was, but he thought he recognized Guildford station, through which he had occasionally travelled on his way to London. The time was about 5.30 on an October afternoon, and according to his own account there was plenty of light for him to have seen that his carriage was not opposite the platform if he had looked. He hurriedly got out without looking and, there being a five feet drop from the carriage to the ground, he fell and broke his leg. That is the whole of the plaintiff's case, and I think it is clear that on that evidence he ought to have been nonsuited. I take the law to be as stated by Lord Hatherley in *Dublin, Wicklow and Wexford Ry. Co.* v.

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Slattery (1), and approved by Lord Watson in *Wakelin* v. *London and South Western Ry. Co.* (2) "If such contributory negligence be admitted by the plaintiff, or be proved by the plaintiff's witnesses while establishing negligence against the defendants, I do not think there is anything left for the jury to decide, there being no contest of fact." Further, I doubt whether here, in the plaintiff's case, there was any evidence of negligence on the part of the defendants; I doubt whether the mere fact of the train stopping at or near a station which is the plaintiff's destination is, without more, an invitation to alight; at all events it is not an invitation to him to alight without looking. When we come to the defendants' case the evidence is overwhelming that any invitation to alight was directly negatived by the warning given by the porter to the passengers to keep their seats.

It is not very profitable to look for guidance in the decisions of judges on the findings of juries in other cases where the facts were different. The only one of the authorities to which we have been referred which has given me any trouble is *Glasscock's Case* (3), and the explanation is to be found in the very insufficient statement of the facts in the report of that case in the House of Lords. We have had the advantage of reading the verbatim judgments of the Court of Appeal, which are set out in the Appendix to the case on appeal to the House of Lords, and which are much fuller than the report of those judgments in the Times Law Reports. (4) The facts, as appearing from those judgments, were that the station where the lady got out was a terminal station; that she got out on to the sloping part of the platform called "the ramp"; that she saw a number of other passengers getting out; that she was very familiar with the station, and knew the ordinary distance from the carriage to the level of the platform; and that there was no warning to her not to get out. Under those circumstances the Court of Appeal and House of Lords held that the jury were entitled to find that the plaintiff was not guilty of negligence in omitting to look

(1) (1878) 3 App. Cas. 1155, 1169.
(2) (1886) 12 App. Cas. 41, 48.
(3) 19 Times L. R. 305.
(4) 18 Times L. R. 295.

before getting out, notwithstanding that if she had looked she would have avoided the accident, a finding which must be taken to have been based upon the relation of the ramp to the platform, and her knowledge of the height of the ordinary part of the platform and the distance between it and the footboard of the carriages. That case seems to me to turn upon very special facts which are not to be found in the present case, and can afford no guidance as to what we ought to decide here. For the above reasons it seems to me that the judge appealed from was wrong, first in not stopping the case at the end of the plaintiff's evidence, and, secondly, in not withdrawing it from the jury at the close of the whole case, and the appeal must therefore be allowed.

ATKIN L.J. I agree. When the whole of the evidence in this case is looked at it seems to me reasonably plain that the plaintiff failed to establish any cause of action against the defendants. I agree that inasmuch as the company habitually dispatched this train of such a length that it was too long for the platform at Guildford, they were under a special duty on the arrival of the train at that station to warn passengers in the overlapping carriages not to alight until they had been drawn up to the platform. But here there was abundant evidence, uncontradicted, that such a warning was given, and that the warning was amply sufficient for any passenger who was not asleep, while it could not be suggested that the company were bound to give such a warning as would waken a sleeping passenger. Therefore there was no evidence on which the jury could find that the defendants were negligent in that respect. But, secondly, the plaintiff in his own evidence conclusively proves that, even if the defendants were negligent, their negligence was not the cause of the accident, but that it was brought about by his own lack of care in not looking to see where he was going. My only difficulty in the present case has been caused by *Glasscock's Case*. (1) There the jury found that the plaintiff could have avoided injury if she had looked before she stepped out,

(1) 19 Times L. R. 305.

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that she did not look before stepping out, but that it was not negligent of her to step out without looking. On those findings the trial judge entered judgment for the defendants. But the Court of Appeal reversed that judgment, and their decision was affirmed by the House of Lords. For the purpose of estimating the true legal value of that case, it is necessary to consider the facts very closely. I do not propose to go through those facts in detail, but I think it was a most material fact that in that case the lady had travelled frequently to and from Shoeburyness station; her carriage had always stopped opposite a portion of the platform where she could step from the carriage on to the platform at the same level, and on the occasion of the accident she was misled by being drawn up, not, as here, at a place where there was no platform at all, but where the platform sloped downwards, forming what is called a ramp. What the Master of the Rolls there said seems to me of importance in estimating the value of the case, and as it is not reported I will read it from the verbatim note of the judgments in the Appendix to the case on appeal. "The question is, was there a want of reasonable care on her part in doing what she did? 'Reasonable care' is a good deal a question for the jury, if there are any facts to be ascertained and decided one way or the other, on which they are to build their conclusion, whether she was or was not reasonably careful. The facts here are these: that she was accustomed to come to this station; that she was entitled to assume that the time for her to get out had arrived; and, I think, also that she was entitled to assume that the conditions were normal, and that to get out where she did was safe. Cockburn C.J., in one of the cases cited by Mr. Bankes, *Cockle's Case* (1), says this: 'Still the purpose always is to bring all the carriages, if possible, to a level with the platform, and therefore a railway traveller is entitled to expect that when he steps out he will step on to the platform.' Reasonable care is always a question of special circumstances, and what would be reasonable in one set of circumstances need not necessarily be reasonable

(1) L. R. 7 C. P. 324.

in another. For instance, where the danger is obvious, where a person is going to cross a line which he knows is traversed by trains running to and fro, the degree of care that is reasonable under those circumstances in looking up and down to see whether a train is coming is very different from the degree of care exacted from a person who is not going to encounter a known risk at all, but who is entitled to expect and assume that there is no risk at all. Those facts were before the jury; and, having regard to what they knew of the plaintiff's experience of this platform, drawing, as they did draw, undoubtedly, the inference that she thought things were normal, and got out under those conditions, they thought that did not fasten upon her the responsibility of looking, not where she went in the sense of jumping on to a man walking up in front, as Mr. Colam puts it, but not looking down and picking her steps in doing an ordinary act which she had done over and over again before, and which involved no special care." Now those facts were very special, and I am bound to say that when they are examined closely the case loses any value as a legal authority, and must in future be treated as one which turned entirely on its own special circumstances. Relieved from the burden of having to regard that case as one laying down any proposition of law that could guide us in the present case, I am unable to avoid the conclusion that the plaintiff here omitted to take the ordinary precaution of looking where he was going, and that under those circumstances, as the accident was caused by his own want of care, he cannot recover from the railway company.

Appeal allowed.

Solicitor for the appellants: *W. Bishop.*

Solicitors for the respondent: *Button, Fitch, Aylmer & Cooper.*

J. F. C.

C. C. A.
1925
July 13.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* HATTON.

Criminal Law—Assault on Child—" Wilfully assaults . . . . child . . . . in a manner likely to cause . . . . unnecessary suffering "—Children Act, 1908 (8 *Edw.* 7, *c.* 67), *s.* 12, *sub-s.* 1.

By s. 12, sub-s. 1, of the Children Act, 1908, " if any person over the age of sixteen years, who has the custody . . . . of any child . . . . wilfully assaults, ill-treats, neglects, abandons, or exposes such child . . . . or causes . . . . such child . . . . to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child . . . . unnecessary suffering or injury to his health . . . . that person shall be guilty of a misdemeanour " :—

Held, that an assault within the meaning of this section must be one which is likely to cause unnecessary suffering or injury to the health of the child.

The appellant, who was the stepfather, and had the custody or care, of a girl of eleven years of age, was charged under the above section with wilfully assaulting the girl in a manner likely to cause her unnecessary suffering. The evidence of the girl was that the appellant committed acts of indecency, not to her, but in her presence, and that when she screamed he put his hand over her mouth :—

Held, that this was not an assault within the meaning of the section.

Appeal from conviction at London Sessions.

The defendant was indicted under s. 12 of the Children Act, 1908 (1), for that he on April 9, 1925, having the custody of Doris Condon, a child aged eleven years, did assault her in a manner likely to cause her unnecessary suffering.

Doris Condon, who was the stepdaughter of, and resided with, the defendant, stated in her evidence that on the evening of April 9, her mother not being then in the house, the defendant came home, and after she had prepared his

(1) Children Act, 1908, s. 12, sub-s. 1 : " If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully assaults, ill-treats, neglects, abandons, or exposes such child or young person, or causes or procures such child or young person to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child or young person unnecessary suffering or injury to his health . . . . that person shall be guilty of a misdemeanour," and is liable, if convicted on indictment, to be fined or sentenced to imprisonment for any term not exceeding two years.

tea he committed acts of indecency, not to her, but in her presence, whereupon she screamed, and he then put his hand over her mouth to prevent her screaming. The defendant denied these allegations, and swore that he was not in the house at the time he was said to have committed the offence. The jury convicted the defendant, and he was sentenced to six months' imprisonment.

The defendant appealed on the grounds (1.) that upon the evidence there was no assault within the meaning of s. 12 of the Children Act, 1908, and (2.) that the Deputy Chairman omitted to direct the jury as to the necessity of corroboration of the child's evidence.

Sells for the appellant. An assault within the meaning of s. 12, sub-s. 1, of the Children Act, 1908, must be one which is likely to cause the child unnecessary suffering or injury to health. The evidence given in this case did not establish that, nor was it even suggested that what was done was likely to cause the child unnecessary suffering or injury to her health. Further, there was no direction to the jury as to the necessity of corroboration of the child's story.

[He was stopped.]

Julian Fuller for the Crown. The evidence was sufficient to show that that which the appellant did was likely to cause unnecessary suffering to the child. With regard to the suggestion that no warning was given to the jury against acting on the uncorroborated evidence of the child, it is submitted that there was ample extrinsic corroboration in view of the fact that the defence was an alibi.

The judgment of the Court (LORD HEWART C.J., AVORY and BRANSON JJ.) was delivered by

LORD HEWART C.J., who stated the facts and continued: The learned Deputy Chairman began his summing up with these words: "The prisoner is charged with assaulting this little girl in a manner likely to cause her unnecessary suffering. There is, and can be, no dispute, if the facts are anything like what is sworn to by that little girl, that the prisoner

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did assault her in a manner likely to cause her unnecessary suffering; therefore the only question you need seriously to consider is whether the prisoner has been proved beyond reasonable doubt to have committed this offence that night, behaved in the disgraceful way of which we have heard, or whether you think the little girl might have made a mistake, or manufactured this story." That was all the direction which the jury were given upon the question of law involved in the construction of s. 12 of the Children Act, 1908. The opening words of that section are just as much qualified by the last words as are the intermediate words; and when one reads the section as applicable to this case, omitting immaterial words, it runs thus: "If any person over the age of sixteen years, who has the custody of any child, wilfully assaults such child, in a manner likely to cause such child unnecessary suffering or injury to his health, that person shall be guilty of a misdemeanour." The words "in a manner likely to cause such child unnecessary suffering or injury to his health," clearly govern "wilfully assaults." Having regard to the sentence which may be imposed for an offence against the section—namely, imprisonment, with or without hard labour, for a term not exceeding two years—one sees that what is contemplated is something more than an ordinary assault. What the section contemplates is a wilful assault such as is likely to cause the child unnecessary suffering. It was, therefore, extremely important that the jury should be fully directed as to the meaning of s. 12, inasmuch as the assault which was relied upon consisted in this, and in this only, that the appellant was said to have put his hand over the child's mouth to prevent her screaming. But it is quite obvious, when one looks at the case as a whole, that the jury might well think that that which was done in the presence of the child, if it was done, was likely to cause, if not suffering, at any rate no little agitation of mind, astonishment and disgust. That, however, is not an assault within the meaning of the section. To convict the appellant under the section it was necessary to show that he committed a wilful assault in a manner likely to cause unnecessary suffering. The

summing up omitted to direct the jury's attention to the real point in the case, and indeed its terms were such as might easily divert their minds from the real point. That is sufficient to dispose of the appeal. But it is desirable to add that, in view of the relationship of certain witnesses, this was pre-eminently a case in which a clear and unmistakable direction should have been given as to the necessity of corroboration of the child's evidence. No such warning was given. On the contrary, the passages which have been relied upon as at any rate approaching such a warning, might well convey to the jury that corroboration was not necessary. In the opinion of the Court the conviction is unsatisfactory. The appeal will therefore be allowed and the conviction quashed.

Appeal allowed.

Solicitor for appellant: *C. H. Weeks.*
Solicitor for Crown: *Director of Public Prosecutions.*

J. S. H.

[IN THE COURT OF APPEAL.]

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Workmen's Compensation—"Arising out of and in the course of the employment"—Taking Home Work against Orders for Purpose of developing Workman's own Skill and Knowledge—Accident out of working Hours and not on Employer's business Premises—"For the purposes of and in connection with his employer's trade or business"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1—*Workmen's Compensation Act*, 1923 (13 & 14 *Geo.* 5, *c.* 42), *s.* 7.

A lad employed as a finisher of boots in the appellant's bootmaking business, took home, in disobedience of orders, a customer's pair of boots in order to execute the necessary repairs to them, his motive being to improve his own skill and so become a repairer, instead of a finisher, of boots at an increased wage. While so working on the boots at home and out of business hours, the lad injured his eye with an awl, with the result that the eye had to be removed. The county court judge held that inasmuch as the work was being done for the purposes of and in connection with the employer's trade or business, the case was covered by s. 7 of the Workmen's Compensation Act, 1923, and he awarded compensation. The employer appealed:—

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Held, that the act which caused the injury did not arise out of and in the course of the lad's employment at all, and that he was not entitled to recover.

Davies v. *Gwauncaegurwen Colliery* [1924] 2 K. B. 651 applied.

Sect. 7 of the Act of 1923 must be read as one with s. 1, sub-s. 1, of the principal Act, and the mere fact that the forbidden, or unbidden, act was done by the workman "for the purposes of and in connection with his employer's trade or business"—will not entitle him to compensation where the act in question did not arise out of and in the course of his employment at all, so as to qring him in the first instance within s. 1, sub-s. 1, of the principal Act.

APPEAL from an award by the judge of the Wandsworth County Court, in favour of the respondent Borley, in the following circumstances.

The respondent, a lad of about seventeen years of age, had been employed by the appellant for some six months in the latter's bootmaking business as a finisher of boots and shoes. He was employed on the premises where the appellant carried on his business, and his business hours were the hours during which he was at work on the appellant's premises. Being anxious to earn higher wages and become a repairer instead of a finisher of boots, on some four occasions the respondent, with the consent of Bailey, the manager, took home boots for the purpose of repairing them. When the appellant heard of it he forbade it, and afterwards neither Bailey nor the appellant gave him facilities for taking home any more. Nevertheless the respondent did take home some boots, and on April 15, when he was working on them, not as a finisher but as a repairer, he injured his eye with the awl, with the result that the eye had to be removed.

The county court judge found that the injury was sustained while working on a pair of boots left by a customer for repair; that the respondent was working on them at his own home; that the appellant's business was repairing boots; that the respondent's idea and motive was to learn to repair and so increase his earning capacity; that the work was well done and calculated to further the employer in his business; and that although the lad had disobeyed orders yet he was doing work for the purposes of and in connection with his employer's trade or business. The county court judge held that the case

came within s. 7 of the Workmen's Compensation Act, 1923, and awarded compensation.

The employer appealed.

Cave K.C. and *Gilbert Paull* for the appellant. In the first place the workman has to bring himself within s. 1, sub-s. 1, of the principal Act, and although the county court judge found that the work was done for the purposes of and in connection with the employer's trade or business, he never found that the accident arose out of and in the course of the employment. It was no part of the respondent's employment to do work at home or to take work home, or to work during hours when his employment did not exist at all, or to do repairing work. Apart from s. 7 of the Act of 1923 he could not have recovered at all, because he never came within the earlier Act. The accident happened when the boy was doing work at home for his own purposes outside the sphere of his employment. That fact differentiates this case from the instance given by Atkin L.J. in *Davies* v. *Gwauncaegurwen Colliery* (1), where the purposes assumed were the purposes of the employer's trade or business. It was not the intention of s. 7 of the later Act to bring within the scope of the principal Act a number of cases which otherwise would not have come within it at all; the intention was to remove the effect of prohibitions in cases where the accident arose out of and in the course of the employment. The last sentence of s. 7 of the later Act does not annul s. 1, sub-s. 1, of the principal Act, nor do they extend it. Sect. 7 does not make an employer liable for any work done for the purposes of or in connection with his trade or business; it is only intended to meet the case of a prohibition accident.

Casswell (*Duckworth* with him) for the respondent. The county court judge found as a fact on sufficient evidence that the boy was doing work for the purposes of and in connection with his employer's trade or business, and this Court will not go behind that finding. The work was not done on a strip of leather and then thrown away, but it was

(1) [1924] 2 K. B. 652.

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done on a customer's boots, and the employer had the benefit of it.

[POLLOCK M.R. It is a strong thing to say that the boy could choose the place, time and method of his employment. The words "applicable to his employment" in s. 7 are important.]

But he was doing it in connection with his employer's business, and the business got the benefit. Sect. 1, sub-s. 1, of the principal Act must now be read without the incrustation of cases which have grown around it, and it must be read in connection with s. 7 of the later Act, which is extraordinarily wide. To bring a workman within the privilege of compensation, it is enough now to show that a workman is employed, and that the accident was caused by an act done by him for the purposes of and in connection with his employer's trade or business. The effect of s. 7 is to strike out the words "arising out of and in the course of his employment" in cases of death or serious and permanent disablement. It is a question, not of bringing back a workman within the Act, but of new legislation altogether.

This case comes within the instance given by Atkin L.J. in *Davies* v. *Gwauncaegurwen Colliery* (1), where he says that it is consistent with the words of the Act that a workman doing an act at home at his own house for the purposes of his employer's trade or business might be entitled to compensation.

POLLOCK M.R. This appeal must be allowed. The arbitration came before the judge at Wandsworth County Court, who, on December 9, 1924, made an award in favour of the lad who was injured. At the time of the injury he was about seventeen years of age, and had been employed by the respondent Ockenden for some six months or a year in his bootmaking business as a finisher of the boots and shoes made by the respondent. He was employed on the premises where Ockenden carried on his business, and his hours of employment were the hours during which he worked on those premises. It appears that the lad was very legitimately

(1) [1924] 2 K. B. 652.

ambitious and was anxious to earn a rise in wages, and wished to qualify himself to become a boot repairer instead of a boot finisher, and — again very legitimately — in order to qualify himself to become a boot repairer he sought opportunity to fit himself for that work, and so it was that on three or four occasions, with the permission of Mr. Bailey, the manager, he took home some boots for the purpose of gaining experience by doing some repairing work on them. This came to the knowledge of Ockenden, who forbade it, and said that the boy must not be allowed to take home boots or shoes. After that neither Bailey nor Ockenden ever gave him facilities for taking home any more. Nevertheless the lad did take home some boots, and on April 15, while doing work on those boots, not as a finisher but as a repairer, he injured his eye with an awl, with the unhappy result that he had to have the eye removed. The condition of the other eye is happily normal.

The county court judge heard the evidence, and he found that the injury was sustained while working on boots left by a customer of the respondent to be repaired; that the applicant did work on them at his own home, though he had been forbidden to take home boots. His findings are: (1.) that Ockenden's business was repairing boots, (2.) that the boy's idea and motive was to learn to repair, and so to increase his earning capacity, (3.) that the work was done well, and so was calculated to, and did in fact further the employer in his business, and (4.) that although the applicant had disobeyed orders, yet nevertheless he was doing work for the purposes of and in connection with his employer's business.

Although it may be true that before the Act of 1923 came into operation on January 1, 1924, a workman, who acted in contravention of regulations or his employer's orders, would not have been entitled to claim compensation, yet it is said that now, by virtue of s. 7 of the Act of 1923, he is entitled to claim it. The county court judge adopted that view, and finding that the work had been done for the purposes of the employer's business, he held that that brought the case within s. 7.

The case has been fully and carefully argued, and we now

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have to consider the effect of s. 7. So far as I know, that section has only once been considered in this Court—namely, in *Davies* v. *Gwauncaegurwen Colliery*. (1) But in considering what the effect of the section is, I think that it is important to recall what was the state of the law at the time when the new Act came into force. Sect. 1, sub-s. 1, of the Act of 1906 provides that "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . . be liable to pay compensation." There have been scores of cases to decide the meaning of the words "arising out of and in the course of the employment," but a particular category of the cases which have been decided deals with cases where there was a breach by the workman of some rule applicable to the employment—a rule imposed either by the regulations of the employer or by statute—or a breach of some orders or instructions applicable to the employment. In two of these cases a working rule has been laid down. In *Barnes* v. *Nunnery Colliery Co.* (2) Lord Loreburn said: "But if the thing he does imprudently or disobediently is different in kind from anything he was required or expected to do and also is put outside the range of his service by a genuine prohibition, then I should say that the accidental injury did not arise out of his employment," and Lord Atkinson says: "In these cases under the Workmen's Compensation Act a distinction must, I think, always be drawn between the doing of a thing recklessly or negligently which the workman is employed to do, and the doing of a thing altogether outside and unconnected with his employment." That case was decided in 1911, and in 1914 Lord Dunedin in the case of *Plumb* v. *Cobden Flour Mills Co.* (3), in a speech which had the concurrence of the three other noble Lords sitting with him, laid down rules which have been regarded as the working rules in cases where an accident has occurred owing to disobedience to a prohibition. He said: "The fallacy of this consists in not adverting to the fact that there are prohibitions which limit

(1) [1924] 2 K. B. 651.
(2) [1912] A. C. 44, 47, 49; 5 B. W. C. C. 195.
(3) [1914] A. C. 62, 67.

the sphere of the employment, and prohibitions which only deal with conduct within the sphere of employment. A transgression of a prohibition of the latter class leaves the sphere of employment where it was, and consequently will not prevent recovery of compensation. A transgression of the former class carries with it the result that the man has gone outside the sphere." That decision was commented upon with approval in *Moore & Co.* v. *Donnelly* (1), which was decided shortly before the Act of 1923 came into operation, where Lord Birkenhead referred to the cases which I have mentioned and also to the other test taken from Lord Sumner's speech in *Lancashire and Yorkshire Ry. Co.* v. *Highley* (2), where that noble Lord said: "There is, however, in my opinion, one test which is always at any rate applicable, because it arises upon the very words of the statute, and it is generally of some real assistance. It is this: Was it part of the injured person's employment to hazard, to suffer, or to do that which caused his injury? If yea, the accident arose out of his employment. If nay, it did not, because what it was not part of the employment to hazard, to suffer, or to do cannot well be the cause of an accident arising out of the employment."

Incidentally it may be pointed out that the case, perhaps on the border line, of *Conway* v. *Pumpherston Oil Co.* (3) is now, in consequence of the decisions in *Plumb's* case (4) and *Moore & Co.* v. *Donnelly* (1), to be held to have been overruled. That was the state of the law down to December 31, 1923. If the accident happened at a time and place not within the ambit of the employment, or when the workman was doing something the doing of which was expressly and genuinely prohibited, he would not previously to 1924 have been entitled to recover.

But it is said now in this case that, in spite of the motive which led this lad to do work at home, he is entitled to recover, because he did it for the purposes of and in connection with the employer's business. It is therefore necessary to

(1) [1921] 1 A. C. 329, 338.
(2) [1917] A. C. 352, 372.
(3) 1911 S. C. 660; 4 B. W. C. C. 392.
(4) [1914] A. C. 62.

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examine the meaning of s. 7, which it is said has wrought this change in the law. Sect. 7 only applies when the accident happened after the beginning of the Act. This accident happened in April, 1924, and so comes under the Act. It is clear from the cases to which I have referred that formerly accidents which occurred by reason of a breach of a prohibition and which put a workman outside the sphere of his employment, could not be accidents arising out of and in the course of the employment. Sect. 7 says: "For the purpose of the principal Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment." I pause there to repeat that the Act of 1923 must be read as one with the principal Act, and that s. 7 must be read with s. 1, sub-s. 1, of the Act of 1906, so that one has to bear in mind the effect of s. 1, sub-s. 1, of the principal Act. Then s. 7 goes on to specify certain conditions respecting the accident. Mr. Casswell, disregarding the subsequent words containing those conditions, suggests that the accident is to be deemed to arise out of and in the course of the employment "if such act was done for the purposes of and in connection with his employer's trade or business," and that if the last words are complied with, the section as a whole is complied with. He says that one, if not the dominant, purpose of this boy's act was to further the employer's business, and that s. 7, construed in its ordinary grammatical meaning, was intended to widen s. 1, sub-s. 1, of the principal Act, so that practically all such cases are within it. I cannot agree, because it does not seem to me to give effect to a large and important part of the section—"notwithstanding that the workman was at the time when the accident happened" (*a*) "acting in contravention of any statutory or other regulation applicable to his employment, or" (*b*) "of any orders given by or on behalf of his employer, or" (*c*) "that he was acting without instructions from his employer." I repeat what I said in *Davies* v. *Gwauncaegurwen Colliery* (1), that it is clear that the purpose

(1) [1924] 2 K. B. 651.

of s. 7 is to bring back within the ambit of the principal Act cases which previously to January 1, 1924, would have fallen outside it by reason of the three categories (*a*), (*b*) and (*c*). Accordingly, if it be found, as in the old cases, that a workman had gone outside the sphere of his employment, because he has done an act in contravention of any of the three categories, he may be deemed to be brought back within the ambit of s. 1, sub-s. 1, of the principal Act, if that act was done for the purposes of and in connection with his employer's trade or business. I am not going to attempt any sort of criticism or to say which cases are overruled, or which stand. I adhere to what I said in *Davies* v. *Gwauncaegurwen Colliery* (1), that *Bourton* v. *Beauchamp* (2) is a good illustration of a case where a workman might be deemed to be brought back into the advantages of the principal Act.

I agree with the way in which my brother Sargant has put it—namely, that the three defences which formerly would have been open to the employer under categories (*a*), (*b*) and (*c*), are withdrawn from him by s. 7; but the further condition imposed by that section must be fulfilled, and that is that the act must be done for the purposes of and in connection with the employer's trade or business, which obviously means that it must be done in connection with the employment.

Now I turn back to consider the findings of the county court judge. He has not found on the evidence that the work was done for the purposes of and in connection with the employer's trade or business, within the meaning of the section, because he has found that the main motive of the applicant was to develop his own skill and knowledge of boot repairing. Even if the expression "employer's business" is to be construed widely, yet the operation on which the applicant was engaged was altogether outside his employment and so not within s. 1 of the Act of 1906 at all. In my opinion you cannot read the inclusion under s. 7 of acts

(1) [1924] 2 K. B. 651, 655, 657. (2) [1920] A. C. 1001.

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formerly barred under the three categories as comprehending the doing by the workman of an act not within his employment at all, and it does not matter that he may have done it "for the purposes of and in connection with his employer's trade or business." On this point of law the county court judge went wrong, and the appeal must be allowed with costs.

SCRUTTON L.J. It is quite obvious that difficult questions other than those in this case may arise upon the construction of s. 7, and therefore I wish to confine what I say to the actual case before the Court. In my view, s. 7 is intended to relieve the workman of certain defences which had before that deprived him of compensation, on condition that the act which caused the accident should comply with a certain definition. Notwithstanding the contravention (1.) of a regulation, statutory or otherwise, (2.) of orders given by the employer, or (3.) that he was acting without instructions, yet if the act is done for the purposes of or in connection with the employer's trade or business it is to be deemed to arise out of and in the course of the employment. I think that the primary object of the section is to relieve the workman of the defences specified if he complies with the condition. Mr. Casswell says that I have exactly stated the effect of the clause, with the result that, although the act done had nothing to do with the employment, although it was not what he should have done, nor done at the time, nor in the place, where he was employed, yet if it were done for the purposes of or in connection with the employer's trade or business, then he can recover. If that is the true construction it would make an enormous change in the legislation effected by the principal Act, a change so wide that I should require to be fully satisfied upon the point before giving effect to what would put so great an extra burden on the employer, for the result would be, that if an employer employed a man upon limited work to produce a limited class of goods, at certain hours and at a certain place, and if the workman at a different place, and at different hours, did a different act, yet, says

Mr. Casswell, if the act could be said to be in connection with the employer's trade, then the employer would be liable. I cannot think that that is a right view, unless very clear words in the Act compel me to accept it.

The first defence affected by s. 7 is, "Although you were doing work you were employed to do, yet you were doing it in a way forbidden by regulations." The second is, "You were doing work against my orders." In *Moore & Co.* v. *Donnelly* (1), shortly before the Act of 1923 was passed, it was decided that either of those defences concluded the matter against the workman. In *Bourton* v. *Beauchamp* (2), the case of a man removing the stemming from a hole already charged, with a view to laying a fresh shot in the same hole, the House of Lords held that as the workman was breaking a statutory regulation applicable to his employment, the workman was acting outside the sphere of his employment, and that the accident did not arise out of and in the course of his employment. But when I find that s. 7 says that for the purposes of the principal Act the accident shall be deemed to arise out of and in the course of the employment, notwithstanding that the workman was breaking a regulation or disobeying orders, and when I find Lord Birkenhead in *Moore & Co.* v. *Donnelly* (1) saying that a prohibition founded upon statute and one imposed by the employer to regulate the employment stand on practically the same footing, then I begin to suspect that the speeches in the House of Lords in *Bourton* v. *Beauchamp* (2) and *Moore & Co.* v. *Donnelly* (1) were the foundation of the provisions inserted in s. 7 of the Act of 1923. I am a little puzzled about the words "or that he was acting without instructions from his employer," and I prefer to reserve any observations upon those words, as I do not quite understand to what they refer. But I am unable to extend the section to a case where the workman was not acting in the course of his employment at all; where he was doing something which he was not employed to do, at a place where he was not employed, and at a time when he was not

(1) [1921] 1 A. C. 329, 339. (2) [1920] A. C. 1001.

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under the orders of the employer, and therefore I prefer to restrict s. 7 to cases where he is acting in the employment, though doing an act which is against statutory regulations or against orders.

There are three principal classes of cases in which, from time to time, the question has arisen whether an employer is liable for compensation. The first is the case of a man doing something he was employed to do, but in a negligent manner; that does not necessarily release the employer from liability. The second is the case of a man doing work which he was not employed to do at all; there he is not doing it in the course of his employment. The third is the case of a man doing work which he was employed to do, but he does it in such a peculiar and unusual way as to make it difficult to say whether he is really doing it in his employment. *Russell* v. *A. & G. Murray, Ld.* (1), was a case of the latter sort, and there the Court held that it was not work that the man was employed to do, because he was doing it in such a peculiar way that it could not be said that it was work that he was employed to do. I think that *Plumb* v. *Cobden Flour Mills Co.* (2) was a case of the same class, and I can see that difficulties may arise when that class of case comes to be considered in the light of s. 7. But in my opinion s. 7 can only apply to protect the workman where he is doing work which prima facie he is employed to do, at the time when, and at the place where he is employed to do it. Now does that fit the present case? [His Lordship stated the facts and continued:] This boy was repairing boots by sewing, which he was not employed to do; he was doing it at home, where he was not employed, and during hours when the employer was not paying him and had no right to control his services. I cannot think that s. 7 can apply to such a case, and in my opinion those facts dispose of the respondent's contentions, and this appeal must be allowed. As to further points under s. 7 I prefer to leave them until they arise.

(1) (1915) 9 B. W. C. C. 81. (2) [1914] A. C. 62.

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SARGANT L.J. During the course of the argument we have been asked to put two alternative constructions upon s. 7 of the Act of 1923, a narrow construction by Mr. Cave, and an extremely broad one by Mr. Casswell. As I understand Mr. Casswell, he asked us to read the last words of s. 7, "If such act was done by the workman for the purposes of and in connection with his employer's trade or business," as if they came immediately after the first three or four lines ending with the words "course of his employment," with the result that instead of the workman having to show that the accident arose out of and in the course of the employment, he has only to show that the act was done for the purposes of and in connection with his employer's trade or business. That is undoubtedly a very sweeping construction, though not more so than was necessary in view of the exigencies of the case which Mr. Casswell had to support, and I do not think that it is the proper construction. The Act of 1923 was passed to amend the Act of 1906, and it is almost entirely occupied with small amendments. It has to be read in connection with the Act of 1906, and this very section in question commences with the words "For the purposes of the Principal Act." It would be going far beyond the scope of those introductory words if such a wide construction of s. 7 were substituted for the more narrow construction which I think it is intended to bear when read as one with s. 1 of the Act of 1906. In my view the construction submitted by Mr. Cave is the true and certainly the more reasonable construction.

It is common knowledge that formerly in cases like *Plumb* v. *Cobden Flour Mills Co.* (1) and *Moore & Co.* v. *Donnelly* (2) the workman had failed to obtain the benefit of compensation, because the act was put outside the sphere of the employment, owing to the breach of statutory or other regulations, and I think the meaning of s. 7 is that the employer shall no longer be able to raise against the workman defences of that class, which had formerly

(1) [1914] A. C. 62. (2) [1921] 1 A. C. 329.

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been successful. You are to wipe out the fact that the workman was acting against regulations, or against instructions, or in defiance of a prohibition, and you are to consider the matter as between the workman and the employer apart from the defences which had previously been put forward on the ground that there had been a breach of such regulations, instructions or prohibition. Then the words of s. 7, "If such act was done by the workman for the purposes of or in connection with the employer's trade or business," are not, as Mr. Casswell contended, enlarging words, but rather limiting words. The earlier words of the section are enlarging words, but the later words limit them, and therefore the workman must show that the act was done "for the purposes of and in connection with his employer's trade or business"; that is, the workman must show that he was acting bona fide in the employer's interest.

I think that in the present case the workman fails to show that. He was doing something outside the time of employment, away from the employer's business, and something which he was not entitled to do in the course of his employment. He was doing it in defiance of a prohibition, but it seems to me that that prohibition was not a limitation of the sphere of his employment like that in *Plumb's* case (1) and in *Moore & Co.* v. *Donnelly.* (2) His disqualification is due to the fact that the employment did not extend to working at home, or to doing repairs, and therefore it was not necessary for the employer to show that there was a prohibition limiting the sphere of employment, and he was not hit by s. 7. He could always raise the broader defence that the act was not within the original sphere of employment at all. Moreover, I think that the workman could only have taken advantage of s. 7 if he could have shown that the act was done with the main object of furthering the employer's business. In this case the main object of the workman was not the interest of

(1) [1914] A. C. 62. (2) [1921] 1 A. C. 329.

the employer, but to advance his own skill, and I think therefore that on that ground also he fails, and that the appeal must be allowed with costs.

Appeal allowed.

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Solicitors for appellant: *Kingsley Wood, Williams & Co.*
Solicitor for respondent: *A. E. Pratt.*

R. M.

[IN THE COURT OF APPEAL.]

C. A. 1925 *March 5.*

DAVIES *v.* GLYNCORRWG COLLIERY COMPANY.

Workmen's Compensation—Restrictions on ending or diminishing weekly Payments—Employer's medical Certificate—Workman's counter medical Report—Unauthorized Cessation of Payments—Application for medical Referee—Arbitration—Workmen's Compensation Act, 1923 (13 & 14 *Geo.* 5, *c.* 42, *s.* 11, *sub-s.* 1; *s.* 14 (*c*) (*i.*) (*ii.*))—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *First Schedule, para.* 15.

Sect. 14 of the Workmen's Compensation Act, 1923, does not merely provide machinery whereby an employer may end or diminish weekly payments in cases of incapacity, but has introduced a new liability upon the employer to the advantage of a workman.

An employer who under s. 14 (*c*) has served a workman with a ten days' notice of his intention to end the weekly payments together with a copy of the medical certificate that the workman has wholly recovered, and has within the ten days received a counter report from the workman's medical practitioner disputing the employer's certificate, must proceed under the section to obtain the certificate of a medical referee, and in the meantime may safeguard himself by paying the weekly payments into Court to abide the result of the certificate of the medical referee or the decision of the judge. If the employer fails to proceed under the section after receipt of the workman's counter report, but stops payment and does nothing more, and the workman then goes to arbitration, the workman, in spite of the fact that the judge finds that he had wholly recovered at the time of the service of the ten days' notice, will be entitled to recover from the employer the weekly payments as from that date down to the date of the award.

APPEAL from an award of the deputy judge of the Neath County Court in favour of the respondent company.

The applicant was a collier employed by the respondent company at their colliery, and on April 13, 1923, he sustained

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an injury resulting in a rupture or inguinal hernia in the right groin. The company admitted liability, and, without any written agreement, paid him compensation at the maximum rate of 1*l.* 15*s.* per week, on the basis of total incapacity from April 13, 1923, to October 7, 1923, when the company found him light work as a pumpsman, and thereafter payment was reduced to 1*l.* per week on the basis of partial incapacity.

On August 14, 1924, the company served the workman with notice, expressed to be pursuant to s. 14 (*c*) of the Workmen's Compensation Act, 1923, that as their medical adviser had certified that the workman had recovered from the effects of the accident and was able to resume his ordinary work, the company intended at the expiration of ten days from the service of the notice to end the weekly payments of 1*l.* The payments finally ceased on August 24 in accordance with this notice. In the meantime the workman served on the company a report of a duly qualified medical practitioner disagreeing with the medical certificate served by the company. The company did nothing more beyond suggesting that the workman should apply for a medical referee. The workman applied to the registrar of the county court to refer the matter to a medical referee, but the registrar took the view that it was not for the workman but for the company to make the application. The workman then issued the ordinary request for arbitration, claiming a continuation of compensation at 1*l.* per week from August 24, 1924, upon the ground that his partial incapacity still continued.

On January 9, 1925, the deputy county court judge made his award, in which he found that the applicant was not entitled to recover any compensation in respect of the arbitration. He was of opinion that the applicant might under ss. 11 and 14 of the Act of 1923 have applied to have the case referred to the medical referee, and he decided that full compensation ceased on August 24, 1924.

The applicant appealed.

Montgomery K.C. and *A. T. James* for the appellant. The fact that the weekly payments were voluntary, and that

there had been no award or recorded agreement does not affect the workman's right to claim arbitration: *Pudney* v. *William France, Fenwick & Co.* (1) The appeal is from the decision that full compensation ceased on August 24, 1924. Sect. 14 of the Act of 1923 means that an employer is not entitled, otherwise than in pursuance of an agreement already made or of an arbitration already decided, to end or diminish weekly payments except in cases (*a*) and (*b*), which do not apply here, and in case (*c*), which is this case, where the workman has served a counter report. In this last case if the employer does not obtain a certificate from a medical referee, he must go on making the weekly payments; but if he applies for a medical referee then he can safeguard himself by paying the weekly payment into Court under proviso (ii.) of the section. The respondents have not availed themselves of this procedure or protection, but they ceased the payments as from August 24, 1924, which they were not entitled to do, and they are liable to pay them as from that date down to the date of the ultimate award—namely, January 9, 1925.

Neilson K.C. and *Edgar Dale* for the respondents. There is no substance in this appeal, for if the appellant is right on the points of law the respondents might have paid the money into Court, and would then in pursuance of the judge's finding have been entitled to have had it paid out to them.

Under para. 1 (*b*) of the First Schedule to the principal Act the weekly payments were payable only "during the incapacity," and if the partial incapacity ended the employer might have stopped payment, and in that case the workman could proceed at once to arbitration. Under the Act of 1923 the workman is not entitled to get any more money than he would have got under the principal Act. There is no penalty for not putting the new Act into operation, and s. 14 provides a mere method of machinery. "Entitled to end or diminish" refers to getting rid of the liability; an employer was always entitled to stop payment, but if he did so wrongly, he had to make good: *Pudney's* case. (1) The new power given to

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a workman by s. 11 of the Act of 1923 to apply for a medical reference would be useless, if the appellant's contention is right, because all the workman would have to do would be to do nothing, and the payments would still continue.

The judge has found as a fact that the partial incapacity ceased on August 24, 1924, and there is nothing in s. 14 which in face of that finding entitled the workman to be paid compensation between that date and the date of the award. There can be no "payment under the principal Act" without a corresponding liability, and there can be no liability under the principal Act without a corresponding disability or incapacity. By August 14 the appellant had recovered, and there was no further liability under the principal Act; and nothing more payable to him. Because the respondents gave a notice under s. 14 the workman is not bound to go on under that section, but he can go, as the appellant did, to arbitration, and the sole point in the arbitration was whether there was any partial incapacity after August 14, and the judge found that fact against the workman, with the result that the liability under the principal Act had ceased as from that date, for under that Act payment continues only during liability; and where there is no liability there is no payment. If the employer stops payment under s. 14 of the Act of 1923, and arbitration follows, s. 14 no longer applies; if the employer is not found liable then cadit quaestio; but if he is found liable then he has to pay up under the principal Act. The object of s. 14 was to stop employers ending or diminishing payments in the case of workmen who were entitled to them, but not in a case, such as this, where the workman was not entitled to the payment.

Montgomery K.C. in reply.

[POLLOCK M.R. Can there be an award operating retrospectively within the meaning of the commencing paragraph of s. 14?]

I know of no award which has been retrospective. "In pursuance of an agreement or arbitration" implies some agreement or award that has already taken place.

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POLLOCK M.R. This is an appeal from an award made by the learned deputy county court judge on January 9 of this year, whereby he determined the matter of an arbitration before him which had been brought by William John Davies against the respondents, who are his employers.

It appears that the appellant Davies was employed by the respondents as a collier at their colliery, and in the course of his work on April 13, 1923, he developed a hernia: that is to say, within the meaning of the Act he had an accident. The employers paid him compensation immediately, as on the basis of total incapacity, up to October 7, 1923. There was no agreement in writing, and no registered agreement, but they accepted responsibility and paid on the full basis, as upon total incapacity. As from October 7, by which time Davies had in large measure recovered, he was found light work by the respondents, and he was paid 1*l.* a week on the basis of partial incapacity. That was continued until August, 1924, but on August 14, 1924, the respondents served a notice upon the workman of their intention to discontinue payments at the end of ten days in accordance with the provisions of s. 14 of the Act of 1923, this Act having come into operation on January 1, 1924. The notice which was served by them was this: "This is to give you notice, pursuant to s. 14 (*c*) of the above Act, that Dr. W. Jones Richards, who has examined you on behalf of the company, has certified that you have wholly recovered from the accident sustained by you on the 13th April, 1923, and that it is the intention of the company at the expiration of ten clear days from the date of service of this notice upon you to end the weekly payment to you of 20*s.* per week," and a copy of the doctor's certificate referred to is set out. The reason for that notice was that s. 14 of the Act of 1923 has introduced a new liability upon the employers to the advantage of the workman. It has declared by its opening words: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration to end or diminish a weekly payment under the principal Act"; after that it proceeds: "except in the

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following cases," and then there are certain exceptions given.

In *Smith* v. *D. Davis & Sons, Ld.* (1), it has been determined, or words have been used which have been accepted as determining, that where a workman is receiving weekly payments under the Act—I am reading the words of Lord Loreburn (2)—" it does not signify whether there is a memorandum or an award or an unrecorded agreement, provided that the man is in fact being paid in respect of the rights conferred upon him by the Act. It would be different if the money were being paid as an act of mere charity or benevolence, for in that case no part of the Act has any application." In the present case, from the time of the accident to October 7, the sum which was paid to the workman was calculated on the basis applicable to total incapacity under the Act, and from October 7, 1923, down to August, 1924, the sums that were paid to him were calculated on the basis of partial incapacity, in accordance with his wages, under the Act. The sums, therefore, that were being paid to him were weekly payments under the principal Act.

Under those circumstances, the employers purported to take advantage of s. 14 and to put in force the scheme which is there laid down. The scheme of the Act is this. It provides, first of all, that it may be possible to diminish or to end a weekly payment where, under sub-clauses (*a*) and (*b*), there are certain overt acts which obviously indicate that the workman has recovered : (*a*) is where he has actually returned to work and (*b*) is where the wages which are his weekly earnings have actually been increased beyond the sum being paid to him weekly. The third case is the one which is of importance here. That provides that the employer may require the workman to be examined by a medical practitioner, and if that medical practitioner certifies that the workman has recovered, then the employer can serve a notice upon the workman saying that at the end of ten days he, the employer, will end the weekly payment or diminish it. That gives certain counter rights to the workman. The period of ten days which is to elapse before the notice given by the

(1) [1915] A. C. 528. (2) Ibid. 533.

employer comes into operation, is required in order that there may be a period during which the workman may take counter action; and if the workman sends to the employer the report of a duly qualified medical practitioner disagreeing with the certificate served by the employer, then the weekly payment shall not be ended or diminished except in accordance with such report.

Pausing there, it seems quite plain that the section was intended to prevent the sudden ending or diminishing of weekly payments made by the employer under the Acts, excepting in the three cases provided—namely, the return to work, the earning by the workman of higher wages than he was being paid for his partial incapacity, or where the employer has served a certificate and that is accepted by the workman and is not countered by a report of his own medical man. Unless you can bring the matter within those three cases the plain words of s. 14 stand, that an employer is not entitled to end or diminish a weekly payment.

Now supposing that the workman obtains a report disagreeing with the certificate obtained by the employer, then what is to happen? Provision is made for that case, and it is this; application can then be made for the whole issue to go before a medical referee in pursuance of para. 15 of the First Schedule to the principal Act, and para. 15 of that Schedule, which as it stood in the Act of 1906 only allowed a referee to be called in upon the application of both parties to the dispute, has now been amended so as to allow a referee to be called in if one of the parties ask that the matter should go before him; with the result, therefore, that opportunity is given to the employer of carrying the matter before the referee and having the issue decided as to whether the medical certificate which he has secured, or the medical report which the workman has secured, is the more accurate.

Then further provision is made. By the very scheme of the Act, the payments to the workman are to continue, but we have now reached a point at which the issue may be decided in favour of the employer; and, if that is so, provision

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is made under the Act that pending the settlement of the dispute the employer may pay the money into Court; he is not to cease to pay it, but he may pay it into Court; and ultimately, under the sub-sections of the second proviso, when the issue has been determined, the money so paid in by the employer can then be paid over to him, if he succeeds, or to the workman, if he succeeds. One other provision is made, in the main commencing clause of the section, by which it is possible to end or diminish the weekly payments in pursuance of an agreement or by arbitration; and I think Mr. Montgomery is right in saying that the meaning of that is that an award may be made determining the payments from and after the award that orders that they shall be so determined, but up to the time of the award you cannot end the payments, because the scheme of the section is to make them continue until you have authority in pursuance of an award.

In the present case, this notice having been given, a counter report was served by the workman, but the employers did not take the steps in accordance with the proviso to the section. They let the matter stand where it was, and refused to make any further payments. Thereupon the workman made application for arbitration and brought the matter before the learned county court judge, and in that arbitration what the workman asked for was that as from August 24 down to the date of the award, the arrears of payments should be made good to the workman on the ground that he was entitled to them under s. 14. The deputy county court judge had made an award that the applicant was not entitled to recover any compensation in respect of this arbitration. He in effect found that the certificate of the medical man called in by the employer was correct, and that it was true that the workman had recovered as from the relevant date in August of 1924. But inasmuch as the employers did not take the steps which have been provided for them to take, and make the payments which they had to continue to pay into Court, they had not safeguarded the money which, if that procedure had been followed, could have been ordered

to be paid out to them by the judge. It appears to me that the deputy county court judge has overlooked the fact that the matter is now not only affected, but governed, by the procedure of s. 14, the main purpose of which is, as I have said, to continue the payments to the workman unless and until, by the authority of an arbitration, by agreement, or in the other ways laid down in the section, the payments are discontinued in an authorized manner. He has purported to treat the matter as one which was left to him without taking into account the effect of s. 14, and the award goes too far in not recognizing the rights of the workman up to the date of the award.

On these grounds, I think that the workman is entitled to recover the sums which would have been payable to him down to January 9 of the present year; that the appeal, therefore, must be allowed with costs; and that an award should be made in favour of the workman for the total sum which represents the payments from the relevant date in August down to January 9 of this year.

BANKES L.J. I agree. The question raised in this appeal is an important one as to the construction of s. 14 of the Workmen's Compensation Act, 1923, as applied to the facts of this case.

I think it material to bear in mind from the commencement that s. 14 only deals with a state of things where the employer is in fact making payments of compensation under the principal Act, and the section deals with the right of the employer to end or diminish such payments.

From the point of view of the employer, it seems to me that the section leaves him in this position. He may not discontinue or diminish any such payment of his own motion, but there are three courses open to him under which he may obtain that right. He may obtain it by agreement with the workman, in which case there is no necessity to take advantage of the provisions of the section. He may obtain it by arbitration, in which case it is not necessary for him to appeal to the provisions of the section. But he may also obtain it

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by taking advantage, if he so elects, of the provisions of the section.

Now what are the provisions of the section? It is a section which provides for three cases which, if they occur, would entitle the employer to discontinue payment. It is not necessary to deal with either the first or the second case; it is only necessary to deal with the third. What the section says is this: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration"—I have dealt with those two possible cases—"to end or diminish a weekly payment under the principal Act except" (inter alia) in the following case, namely, a case where the employer, having elected to take advantage of the provisions of the section, obtains from his own medical man a report which authorizes him, the employer, in the belief that either the payment may be lawfully and properly discontinued altogether or diminished; and if he obtains such a report from his medical man the statute says that, having obtained that report, he must give the workman ten days' notice, and subject to the proviso, having taken that action, he would be entitled to discontinue the payment if nothing further happened. But supposing the workman takes the step which the proviso to the section authorizes him to take, what happens then? The step to be taken by the workman is to consult his medical man and to see whether his medical man agrees with the view of the medical man of the employer; and if he does not and reports to that effect then, as I read the section (and it really seems to me to be plain beyond controversy), if such a report is made, and it disagrees with the certificate and is served upon the employer, the statute says that the weekly payment shall not be ended or diminished, except in a certain event. That event is this, that a medical referee may differ from the report of the workman's medical man, and in so far as that medical referee's report may differ from the report of the medical man of the workman, the employer would be entitled to end or discontinue the payment in accordance with the certificate of the medical referee.

What happened here was this. The employer obtained the certificate of his medical man and served the notice. The workman took the course (which the statute entitled him to take) of obtaining a report, and he served that report. What is to happen under the statute in that event? It seems to me clear beyond controversy, as I have already said, that unless and until some report of a medical referee is obtained, entitling the employer to make some payment other than the one indicated in the report of the medical man of the workman, he must continue to pay that amount.

If that is the true construction of this proviso, it follows that although the section does not say so in terms, as a matter of common sense, the employer for his own protection must take the step of appealing to the medical referee. If he does not, the alternative is that he has to continue to pay. If he desires to cease to continue to pay, his course under the second proviso to the section is to apply for the appointment of a medical referee. The dispute here has arisen because each party desires to throw upon the other the cost of the fee of the medical referee, and it is for that reason, I suppose, that the whole of the trouble has arisen.

The next thing that happened was this. This dispute arising, the workman, according to my view, made an error in tactics in applying for arbitration at all. He had much better have done nothing, and doing nothing (and the employers maintaining their position and doing nothing), under the statute the payments which were being made at the time when the employers sought to take advantage of the provision of the section would continue to be payable. But the workman took the course of applying for arbitration, and the matter came before the deputy county court judge; and then there were two questions undoubtedly before him. One was as to the incapacity of the workman, and that was a matter which the judge had jurisdiction to deal with, because the workman had applied for arbitration. The judge decided that point in the employers' favour, and by the form of his award he indicated that in his opinion over the whole material period during which the payments

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had ceased, the incapacity of the workman had ceased. But that does not touch the question of law which had arisen owing to the employers having elected to take advantage of the provisions of the section; and having elected to take advantage of the provisions of the section, they were bound to comply with them. Not having complied with them under the express language of the section, as I read it, they continued to remain liable to pay the amount which was indicated by the report of the medical man of the workman to be the proper amount payable over that period to the man. In my opinion, therefore, on that question of law, the deputy county court judge put an interpretation upon the statute which was not justified, because he dealt with it by saying that he thought it was open to the workman to apply for the appointment of a medical referee.

I only want to deal quite shortly with two points which were raised in *Pudney's* case (1) to show that in my opinion what we are now deciding is in no way contrary to that case. The position in *Pudney's* case (1) was this, that the employer sought to take advantage of the provision of the section. The workman did not obtain any report from his medical man, and the question was whether, under those circumstances, the workman was shut out from arbitration. The Court decided that he was not, and that it was open to him either to refuse or neglect to take the action indicated by the section and to prefer arbitration. Nothing that I have said, I hope, in the least interferes with that decision. Scrutton L.J. also dealt with the question of the employer, and he suggested that in his view where the employer had taken advantage, or sought to take advantage, of the provisions of the section, and the workman had obtained a report from his medical man, that did not debar the employer from proceeding to claim arbitration. I do not think he decided it, and it appears to me to be a matter which deserves consideration whether, an employer having appealed to the section for the right to discontinue payments, and the workman responding to that action of the employer, the employer can then turn

(1) [1925] 1 K. B. 346.

round and claim arbitration. It did not directly arise in *Pudney's* case (1), and therefore would be only a dictum of Scrutton L.J., and speaking for myself I think that particular point might well be reserved for consideration.

SARGANT L.J. I am of the same opinion. This appeal involves the construction of s. 14 of the Workmen's Compensation Act, 1923, which was passed for the purpose of amending the Act of 1906.

As pointed out by Warrington L.J. in *Pudney's* case (1): "Apart from the Act" of 1923 "an employer making a voluntary payment was entitled to end or diminish it summarily and of his own authority without taking any preliminary steps or giving any notice of his intention so to do," and that was an obvious blot in the administration of the law, because as between an employer and a workman dependent on his weekly receipts, it would be extremely hard that he should summarily and without any process at all be deprived of the weekly payment upon which he was dependent; and in view of that s. 14 was passed. Sect. 14 seems to me to operate in a very plain and intelligible manner, notwithstanding the elaborate arguments we have heard to the contrary. It provides that: "An employer shall not be entitled otherwise than in pursuance of an agreement or arbitration"—which I think means in consequence of, or following on, an agreement or arbitration—"to end or diminish a weekly payment under the principal Act except in the following cases." There are three cases. The first two cases are cases where the workman, either by returning to work, or by receiving a higher wage, has shown in fact practically that the incapacity has either ended or diminished. The third case is the case where the employer gets a certificate from his medical adviser that the workman's incapacity has wholly or partially ceased. That, of course, has to be hedged about with certain restrictions, otherwise it would depend merely upon the certificate of some one who was acting on the instructions of the employer; and the workman is protected in this way.

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that the workman may thereupon go to his medical adviser, and, if he obtains a report from that medical adviser which disagrees with the certificate of the employer's medical adviser, then the matter has ultimately to be referred to a medical referee. In proviso (i.) to sub-head (*c*) the words are repeated that in such a case "the weekly payment shall not be ended or diminished, except in accordance" with the report—that is, to the extent to which the report agrees with the previous certificate. Then, the matter being now in dispute between the parties, the weekly payment is to continue to be paid; the employer is not in a position to end or diminish it until that dispute is decided.

But there is special provision made for the protection of the employer, who might not be in a position to recover the weekly payments from the workman in case the decision should be in the employer's favour. Special provision is made for the employer to be at liberty to protect himself by paying the amounts in dispute into Court, and the amounts so paid into Court will abide the event of the certificate of the medical referee, or, it may be in certain cases, the decision of the judge.

Now that scheme seems to me to be perfectly clear, definite and intelligible. It is one protecting the workman by providing that the weekly payments shall not be arbitrarily ended or diminished, and that the only method of ending or diminishing them is by the process that I have described. If (as was contended for by the respondents) the employer might, notwithstanding these provisions, simply hold his hand and say: "The workman has recovered and therefore I will make no further weekly payments," the matter would be left really in exactly the position in which it was before the passing of this section into legislation. The provision that the employer for his protection may pay the money into Court to abide the event seems to me wholly incompatible with any view of the section which would leave the employer at liberty, pending the decision of the question, simply to end or diminish the payments in the meantime.

In this case the whole dispute has arisen from the attitude

of the employers who have said: "We, having given our certificate, and having formed our opinion as to the recovery of the workman, notwithstanding the fact that the workman has responded with a report under the section, we may, on our own view of the facts, stop these weekly payments"; and the contest between the parties really has been as to who should take the initiative in appointing the medical referee. The Act does not say in terms who is to appoint the medical referee, but in practice it seems to me that it clearly throws that upon the employer, because unless the step of making the application is taken by some one or other, then under the very words of the section the employer has to continue (or may not end or diminish) the weekly payments, with the result that if he desires to end or diminish the weekly payments, it necessarily falls on him, and not on the workman, to take the necessary step to have the matter determined.

In my opinion the deputy county court judge was wrong in taking the view that because he held that the workman had, at the beginning of the period—namely, August 24—recovered, that therefore the workman was not entitled to get the weekly payments as from that date forward down to the date of the county court judge's judgment. It seems to me that the result of that would be to put a premium upon employers merely holding their hands arbitrarily and not continuing the payments, because it is quite clear that if the employer had (as I think he was bound to do) made the payments during that disputed period, there was no machinery at all apart from the provisions of the section, under which the amounts of those payments could have been recovered by him from the workman. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett, for Morgan, Bruce & Nicholas, Pontypridd.*

Solicitors for respondents: *Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.*

R. M.

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March 26.

ISAACS *v.* KEECH.

False Imprisonment—Arrest on Suspicion—Charge of Importuning—Honest and reasonable Belief—Town Police Clauses Act, 1847 (10 & 11 *Vict. c.* 89), *s.* 28.

Sect. 28 of the Town Police Clauses Act, 1847, provides: "Every person who in any street, to the obstruction, annoyance, or danger of the residents or passengers, commits any of the following offences" shall be liable to a penalty or imprisonment as therein mentioned, "and any constable or other officer appointed by virtue of this or the special Act shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits any such offence (that is to say). . . . . Every common prostitute or night-walker loitering and importuning passengers for the purpose of prostitution; . . . . ":—

Held, that under that section in order to entitle a constable to take a person into custody without a warrant it is not necessary that the person should be in fact committing the offence provided that the constable honestly and on reasonable grounds believes that she is committing it.

Trebeck v. *Croudace* [1918] 1 K. B. 158 followed.

Appeal from Birmingham County Court.

On the evening of July 14, 1924, the plaintiff, Dora Isaacs, aged twenty-one, was taken into custody by the defendant, Keech, a police constable of Birmingham, without a warrant, on a charge that on that date in a street in that city she was importuning passengers for the purpose of prostitution, the defendant purporting to act under the Town Police Clauses Act, 1847, s. 28. (1)

The plaintiff was brought before a magistrate at Birmingham on that charge.

The defendant stated in evidence that he and other police officers had known the plaintiff for a considerable time and had her conduct under observation, that on the evening in question he and another police constable called Waite had seen the plaintiff accosting two or three men, that in the instance in question they were only ten yards from the couple, that the defendant went up to the man and his fellow constable to the plaintiff, that the defendant stated

(1) The section so far as material is set out in the headnote.

that they were two police constables and asked the man in her presence what she had said, that he replied that she had said : " Good evening, would you like a girl to-night ? " that the defendant then said that he was going to arrest her for importuning for the purpose of prostitution, that the man refused further to mix himself up in the affair, that the plaintiff said : " I was not doing anything to-night," that on the previous July 11 the defendant had seen the plaintiff speaking to three men, and on his asking her how she came to be speaking to so many men she replied that she could not help it, as the men all spoke to her, and that on another occasion the defendant had seen the plaintiff get into a taxicab with a gentleman. Police constable Waite corroborated the defendant's evidence in all material points. Another constable called Dudley stated that he had seen the plaintiff in a fish shop when several prostitutes were there, and on three occasions with different men, and his evidence was corroborated by a constable Smith. Several other constables alleged loose conduct by the plaintiff. A police woman said that she had observed improper behaviour on the part of the plaintiff on more than one occasion, though the plaintiff always moved away quickly when she saw the witness.

The plaintiff denied these allegations, and stated that she was a tailoress, that on the date in question she was working for a tailor by whom she had been employed for three years, that she lived with her mother and sister, that on the evening in question they went out about 7 P.M. and were not to return till 10.30 P.M., that the house was locked up during their absence and she could not get into it, that she had then only 1*d.* in her possession, that she proceeded to walk about the city, that about 8 P.M. she met at the general post office some girls who were going to dances, that about 9 P.M. she left them at the Theatre Royal and walked towards her home, that at 10 P.M. when by the Futurist Theatre she met a man who accosted her and asked her where she was going, and on her saying " home " he passed on, that immediately afterwards a policeman in plain clothes tapped her on the shoulder and

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took her into custody, although the man who had spoken to her refused to give evidence and said she was being taken up for nothing, and that she was conveyed through the streets to the police station and detained there till after midnight, and she admitted that she was in the habit of taking walks through the city at night time, but only for exercise, which she was ordered to take, and not for any immoral purpose. On behalf of the plaintiff a doctor gave evidence that she was a virgo intacta, and his evidence was not contradicted or disputed.

The magistrate dismissed the charge.

On October 13, 1924, the plaintiff brought the present action in the county court against the defendant for alleged wrongful arrest and false imprisonment. In her particulars of claim the plaintiff alleged special damage, 6*l.* 6*s.*, made up of costs of defence 5*l.* 5*s.*, and doctor's fees for medical examination and giving evidence 1*l.* 1*s.*; and she claimed 100*l.* damages.

The defendant relied by way of defence upon the above mentioned section.

At the trial the evidence on both sides was substantially the same as that above mentioned. The county court judge accepted the police evidence, and found that the plaintiff's conduct had been such as to expose her to the gravest suspicion; but, having regard to the medical evidence, he could not find that she was a common prostitute within the meaning of the section or at all, and it had not been alleged that she was a night walker. He therefore held that her arrest was not justified under the above section; but, believing that the defendant had acted bona fide in the honest discharge of his duty, he assessed the damages at seven guineas only.

The defendant appealed on the grounds that on the county court judge's findings of fact the defendant had acted reasonably and bona fide, and that the judge had misdirected himself, both in fact and in law, in holding that the defendant was not justified under the said section in arresting the plaintiff without a warrant.

Travers Humphreys for the defendant. The county court judge was wrong in holding that the defendant was not justified under s. 28 of the Town Police Clauses Act, 1847 (1), in taking the plaintiff into custody. That section on its true construction entitles a constable to take into custody not only a person who within his view to the annoyance of the residents or passengers, in fact commits the offence with which the plaintiff was charged, but also a person whom he honestly and on reasonable grounds believes to be committing the offence. To construe the section as meaning that the constable is only entitled to arrest a person who has, in fact, committed the offence and will be ultimately convicted, would be unreasonable, because there may well be circumstances unknown to the constable which establish that person's innocence and will induce the Court by which she is tried to acquit her. In *Trebeck* v. *Croudace* (2) it was held by the Court of Appeal that s. 12 of the Licensing Act, 1872, which provides that a person who is drunk while in charge on a highway of any carriage may be apprehended, authorized the apprehension by a constable of a person whom he honestly and on reasonable grounds believed to be committing that offence. There is no substantial distinction between the section which was under consideration in that case and the section in question in the present case, and that case therefore governs the present case. The cases of *Downing* v. *Capel* (3) and *Chamberlain* v. *King* (4), which were referred to in the case already cited, also support the construction contended for by the defendant.

In the present case the defendant acted honestly and on reasonable grounds in arresting the plaintiff. The evidence given on behalf of the defendant, and accepted by the county court judge, went to show that the conduct of the plaintiff was such that any reasonable person would naturally have supposed that she was committing the offence for which the defendant arrested her. On his findings that the plaintiff's conduct was such as the police witnesses described it to be

(1) See note (1) ante, p. 354.
(2) [1918] 1 K. B. 158.
(3) (1867) L. R. 2 C. P. 461.
(4) (1871) L. R. 6 C. P. 474.

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and that the defendant acted reasonably in arresting her, the county court judge should have entered judgment for the defendant.

R. A. Willes for the plaintiff. The county court judge rightly held that the defendant was not justified under s. 28 of the Act of 1847 (1) in taking the plaintiff into custody without a warrant. Any enactment authorizing a constable to take into custody without a warrant a person committing an offence ought, in the absence of any indications to the contrary, to be strictly construed as meaning that the constable is to act only where the person has actually committed the offence. The section here in question on its true construction only authorizes a constable to take into custody without a warrant a person who to the annoyance of the public is in fact committing the offence with which the plaintiff was charged, and not a person whom the constable, even honestly and reasonably, believes to be committing the offence. In *Bowditch* v. *Balchin* (2) it was held that a police constable of the City of London had no power under a local Act of 1839 for regulating the police in the City of London (2 & 3 Vict. c. xciv., ss. 8, 9), to take a person into custody without a warrant merely on suspicion that he had committed a misdemeanour. The cases cited on behalf of the defendant are distinguishable. In *Trebeck* v. *Croudace* (3) the police officer was held entitled to make the arrest on his mere honest and reasonable belief that the offence there charged was being committed, because of the imminent danger to the public which was involved in the commission of that offence; but the offence in question in the present case does not involve imminent danger to the public. Moreover, in that case the section provided that the person committing the offence "may" be apprehended, whereas in this case the section is mandatory in its terms, providing that the constable "shall" take into custody any person who commits the offence. The cases of *Downing* v. *Capel* (4) and *Chamberlain* v. *King* (5)

(1) See note (1) ante, p. 354.
(2) (1850) 5 Ex. 378.
(3) [1918] 1 K. B. 158.
(4) L. R. 2 C. P. 461.
(5) L. R. 6 C. P. 474.

were decided under s. 103 of the Larceny Act, 1861, which expressly provides that a person found committing any offence under the Act may be "immediately" apprehended without a warrant, thus impliedly giving a constable power to apprehend on a mere suspicion and before he can be sure that the suspect has actually committed the offence, but in the section here under consideration there is no such expression as that. If the section means that a constable can only take into custody a person who actually commits the offence with which the plaintiff was charged—namely, that of being a common prostitute, loitering and importuning passengers for the purpose of prostitution, to their obstruction or annoyance—then it is clear that it did not authorize the defendant to take the plaintiff into custody, because the plaintiff did not in fact commit the offence. The medical evidence shows that she was not a prostitute, and further there is no evidence to show that she was importuning passengers to their obstruction or annoyance. Even if the section means that a constable may take into custody a person whom he honestly and on reasonable grounds believes to be committing the offence with which the plaintiff was charged, the defendant was not entitled to take the plaintiff into custody, because he had no reasonable grounds for believing that she was committing the offence. The evidence as a whole, and even the police evidence alone, did not suffice to show that the conduct of the plaintiff was such that any reasonable person could have supposed that she was importuning passengers to their obstruction or annoyance. Much of the evidence given on behalf of the defendant as to the plaintiff's past conduct was only admitted under protest. One of the objects of this section is no doubt to protect the public from annoyance, but the section contains no provision, express or implied, which is inconsistent with the general policy of the law to protect individuals from illegal arrest.

BANKES L.J. This appeal raises a question as to the true construction of s. 28 of the Town Police Clauses Act, 1847. That section provides that every person who in any street

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to the obstruction, annoyance or danger of the residents or passengers commits any of certain specified offences, one of which is that of being a common prostitute, loitering and importuning passengers for the purpose of prostitution, shall be liable to a penalty or imprisonment, "and any constable . . . . shall take into custody, without warrant, and forthwith convey before a justice, any person who within his view commits any such offence." In enacting a provision of that kind empowering a constable to take into custody without a warrant a person who commits an offence, the Legislature has two conflicting interests to consider. There is on the one side the interest of the individual, who should be protected against illegal arrest, and there is on the other side the interest of the public, which requires that for the maintenance of order and safety there should be an immediate interference with persons committing certain offences, and the Legislature no doubt always intends that the former of these interests as well as the latter should receive due attention. I think, however, that the whole trend of authority has been to put a uniform construction upon enactments giving power to arrest without a warrant a person found committing an offence, and to hold that what the Legislature has in mind is not a mere power to arrest the person ultimately found guilty of the offence, but is a power to be exercised by the proper authority of acting at once on an honest and reasonable belief that the person is committing the particular offence.

The question of the proper construction of a provision of that kind was dealt with by the Court of Appeal in the case of *Trebeck* v. *Croudace*. (1) The Court had there to consider the meaning of s. 12 of the Licensing Act, 1872, which provides: "Every person . . . . who is drunk while in charge on any highway . . . . of any carriage . . . . may be apprehended." The argument on the one side was that that section only authorized the apprehension without a warrant of a person who was in fact drunk, while the argument on the other side was that the section authorized the apprehension of a person

(1) [1918] 1 K. B. 158.

whom the police officer had only reasonable grounds for believing to be drunk; and the Court there adopted the latter contention. It is said on behalf of the present defendant that a similar construction should be put upon s. 28 of the Act of 1847. It is true that that section directs that the constable "shall" take into custody a person who commits the offence, while s. 12 of the Act of 1872 provides that a person committing the offence "may" be apprehended, and that that marked distinction in language between the two sections might be said to show that the constable has not the same discretion to refrain from arresting a person under the former section as under the latter. On the other hand, however, the former section introduces for the protection of the individual the qualification that the police constable is only to act where the offence is committed "within his view," which limits him to things which occur before his own eyes and prevents him from acting merely on information which he has received from other persons. I therefore think that the section which is in question in the present case should be construed in the same way as that which was before the Court of Appeal in *Trebeck* v. *Croudace* (1); and, having regard to the finding of fact of the county court judge that the defendant acted reasonably and in good faith, I further think that this case is covered by the decision in that case.

In my opinion this appeal should be allowed, and on the main issue in the case judgment should be entered for the defendant.

I desire, however, to add one further observation. The plaintiff is no doubt anxious to retain the judgment of the county court judge in so far as it is based upon the findings of fact in her favour, and I think that to that extent she is entitled to say that those findings remain unaffected by the decision of this Court.

SCRUTTON L.J. I am of the same opinion. The case turns upon the construction of s. 28 of the Town Police

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Clauses Act, 1847. [His Lordship read the section and continued :] It is to be observed that the section only gives a constable the power to take into custody without a warrant a person who " within his view " commits the offence, so that, in any case, the constable must actually see the person committing the offence in order that he may have the power to arrest him. The question which here arises is whether the power which the section gives to a constable to take a person into custody without a warrant only comes into existence where that person will eventually be convicted by the tribunal by which he is tried, or whether it arises where the constable is satisfied on reasonable grounds that that person has committed the offence. I endeavour to appreciate the argument that the Courts should be slow to construe an enactment of this kind as giving the constable power to arrest a person on a mere honest and reasonable belief that that person has committed an offence, and if the question were free of authority I should take time to consider whether we ought to read into this section the words " in his honest and reasonable belief." I find myself bound, however, by the decision of the Court of Appeal in the case of *Trebeck* v. *Croudace*. (1) I am unable to distinguish between the present case and that case, except in so far as they arose under different Acts. In that case the section under consideration was s. 12 of the Licensing Act, 1872, which provides that : " Every person . . . . who is drunk while in charge on any highway . . . . of any carriage . . . . may be apprehended." The Court of Appeal there held that in that section the words " who is drunk " mean who the constable honestly and on reasonable grounds believes is drunk, and, the jury having found that the defendant had acted honestly and reasonably, the Court entered judgment for the defendant. Much of the reasoning in the judgments in that case regarding the section there in question applies equally to s. 28 of the Act of 1847. I realize the force of the argument founded upon the distinction in language between the two sections, which has already been referred to. I think, however, that the judgments in that

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case oblige me to put the same construction upon this section as was put in that case upon the section which was there before the Court.

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Appeal allowed.

Solicitor for appellant: *M. P. Pugh, Birmingham.*

Solicitors for respondent: *Foster, Grave & Joy, for Baker & Co., Birmingham.*

J. R.

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Local Government — Private Street Works — Expenses — Apportionment on Frontage—Objection by Frontager—Degree of Benefit—Appeal to Minister of Health—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 268—*Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 1; 7; 8, *sub-ss.* 1, 2; 10.

Sect. 268 of the Public Health Act, 1875, has not been superseded or rendered nugatory by s. 8, sub-s. 2, or by any other provision, of the Private Street Works Act, 1892, or otherwise, as regards objections to an apportionment of the expenses of private street works, other than objections admissible under the latter Act; and, consequently, a frontager, who takes an objection not so admissible to an apportionment of that kind, is entitled under the section first above mentioned to address a memorial to the Minister of Health, as the successor of the Local Government Board, stating the objection, and the Minister is entitled thereunder to make such order in the matter as to him may seem equitable.

Hayles v. *Sandown Urban Council* [1903] 1 K. B. 169, 175; *Pearce* v. *Maidenhead Corporation* [1907] 2 K. B. 96, 100; and *Bridgwater Corporation* v. *Stone* (1908) 99 L. T. 806, 808; 72 J. P. 487, 489; 6 L. G. R. 1171 referred to.

ORDER NISI for a writ of mandamus.

At the times of the occurrences hereinafter mentioned Mr. Harry Aldridge was the owner in fee simple of certain land on the south side of Orchard Road, in the borough of Chipping Wycombe, in the county of Bucks, having a frontage of 1334 feet to that road. In May, 1920, the council of that borough purchased land on the north side of that road having a frontage thereto of 1326 feet, 6 inches, for the purpose of

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erecting thereon houses for the working classes. On September 20, 1921, the council resolved to execute certain private street works in the said road, and they approved specifications, plans, sections, estimate, and provisional apportionment prepared by their surveyor for sewering, levelling, paving, metalling, flagging, channelling, and making good the said road and providing proper means of light therein; and the council gave statutory notice that the works would be executed at the expense and cost of the respective owners of premises fronting, adjoining, or abutting on the said street. On October 27, 1921, Mr. Aldridge served a notice upon the council in accordance with the Private Street Works Act, 1892, s. 7 (1), objecting to the proposals of the council on the grounds therein set forth, none of which was for the purpose in question material. On February 23, 1922, the justices in the said borough, being a court of summary jurisdiction, considered the objections, and they thereupon did not amend the provisional apportionment, and they were of opinion that they had no power to take into consideration the greater or less degree of benefit to be derived by the premises fronting the road through the works. The council accordingly carried out the work, the expenses of which amounted to 3918*l.* 13*s.* 11*d.*, and on January 15, 1924, they made a final apportionment of these expenses, by which Mr. Aldridge's premises were shown as liable to be charged with the sum of 1964*l.* 17*s.* 5*d.* By that apportionment, that is to say, by the decision of the council as to and involving that apportionment, Mr. Aldridge deemed himself aggrieved. On July 29, 1924, Mr. Aldridge received from the council an application for payment of the said sum of 1964*l.* 17*s.* 5*d.*

Mr. Aldridge addressed to the Minister of Health a memorial dated August 9, 1924, which by his instructions was enclosed in a letter dated August 11, 1924, from his solicitors to the solicitor to the Ministry of Health. That memorial contained, among others, the following paragraph:

(1) The statutory provisions so far as relevant to the case are set out below in the judgment of Lord Hewart C.J.

"12. Your memorialist is aggrieved by the resolution of the council apportioning the expenses according to the frontage of the respective premises and considers that the greater degree of benefit to be derived by the premises belonging to the council from the works should be taken into consideration and the expenses apportioned accordingly, and your memorialist feels that it is unjust that the council as joint frontagers should have been enabled to decide the apportionment of the expenses, especially as the works were executed entirely for the benefit of the housing scheme of the council and to the detriment of his land." The memorial concluded as follows: "The memorialist therefore prays that the Ministry of Health will order that the expenses be apportioned according to the degree of benefit to be derived by the frontagers respectively from the said works and make such other order in the matter as to the Ministry may seem equitable."

The council of the borough, to whom a copy of the above memorial had been sent, submitted to the Minister of Health in answer thereto a memorial of their own dated September 9, 1924, in which they alleged, among other things, that the apportionment according to frontage was fair and equitable, and that any houses built on Mr. Aldridge's land would have the benefit of the street works in Orchard Road equally with the council's houses.

The Minister of Health, having received and considered these memorials, refused to entertain the appeal of Mr. Aldridge. The decision of the Minister and the grounds on which it was based were expressed in the following letter dated October 21, 1924, from the solicitor to the Ministry of Health to Mr. Aldridge's solicitors: "With reference to your letter of the 11th August and the memorial of Mr. H. Aldridge enclosed therewith, I am directed by the Minister of Health to say that he has given careful consideration to the memorial, but he is advised that the choice between an apportionment on frontage alone and an apportionment taking into account degree of benefit is a matter in the absolute discretion of the local authority in respect of which no appeal lies to the Minister

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under s. 268 of the Public Health Act, 1875. (1) I am accordingly to say that the Minister regrets that he is unable to entertain Mr. Aldridge's appeal in the present case. It is open to your client, if so advised, to test the correctness of the Minister's interpretation of the statute in a Court of law, and the Minister would of course be prepared to give every facility to him for the purpose of obtaining a judicial ruling on the point."

On December 5, 1924, Mr. Aldridge obtained an order nisi calling upon the Minister of Health to show cause why a writ of mandamus should not issue commanding him to consider the matter of the said memorial of Mr. Aldridge, upon the grounds that a ruling of the Court was desired, and that it was right that it should be obtained, on the question of law whether in the circumstances an appeal lay to the Minister of Health under s. 268 of the Public Health Act, 1875; and notice of the order nisi was given to the said Minister and to the council of the borough.

Sir Douglas Hogg A.-G. and *W. Bowstead* for the Minister of Health showed cause.

Montgomery K.C. and *William Allen* for the borough council.

Scholefield K.C. and *H. du Parcq* for the applicant in support of the order nisi.

The arguments sufficiently appear from the judgments, and in the course of them the following cases were cited: *Reg.* v. *Local Government Board* (2); *Hayles* v. *Sandown Urban Council* (3); *Pearce* v. *Maidenhead Corporation* (4); *Bridgwater Corporation* v. *Stone* (5); *Rex* v. *Essex Justices*; *Ex parte Barking Urban Council.* (6) It was pointed out that according to the report of the case of *Bridgwater Corporation* v. *Stone* (5) in the Law Times, Lord Alverstone C.J. towards the end of his judgment said: "In the absence of a resolution,

(1) See note (1) ante, p. 364.
(2) (1882) 10 Q. B. D. 309.
(3) [1903] 1 K. B. 169, 175.
(4) [1907] 2 K. B. 96, 100.
(5) 99 L. T. 806, 808; 72 J. P. 487, 489; 6 L. G. R. 1171.
(6) [1916] 2 K. B. 406.

which the urban authority might have passed, the respondent's remedy, if any, is by appeal to the Local Government Board . . . ."; but that, according to the reports of the same case in the Justice of the Peace and the Local Government Reports, his Lordship, while using language otherwise similar, omitted the words "if any."

LORD HEWART C.J. This is an order nisi for a writ of mandamus to be directed to the Minister of Health commanding him to consider the matter of a certain memorial dated August 9, 1924, addressed by Mr. Aldridge to the Minister in accordance with the provisions of s. 268 of the Public Health Act, 1875, and in pursuance of the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), ss. 1-3, and to make such order in the matter as to the Minister shall seem equitable. The grounds stated in the rule are that a ruling of the Court is desired, and that it is right that it should be obtained on the question of law whether in the circumstances an appeal lies to the Minister of Health under s. 268 of the Act of 1875.

The circumstances of the case may be shortly summarized. [His Lordship stated the facts leading up to the presentation of the said memorial, and continued:] On August 11 Mr. Aldridge addressed to the Minister of Health the memorial already mentioned. In para. 12 of that memorial he explains that he "is aggrieved by the resolution of the council apportioning the expenses according to the frontage of the respective premises and considers that the greater degree of benefit to be derived by the premises belonging to the council from the works should be taken into consideration and the expenses apportioned accordingly." He further expresses the view that the council as joint frontagers cannot justly be permitted to decide finally the apportionment of the expenses, especially as the works were executed, he says, entirely for the benefit of the housing scheme of the council and to the detrime
Mr. Aldridge's land. That memorial having been received, the Minister of Health on October 21, 1924, refused to entertain the appeal. He refused because, as he said, he was

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advised that the choice between an apportionment on frontage alone and an apportionment taking into account degree of benefit is a matter in the absolute discretion of the local authority in respect of which no appeal lies to the Minister under s. 268 of the Act of 1875. It is fair to add that the Minister of Health went on to say that it was open to Mr. Aldridge, if so advised, to test the correctness of the Minister's interpretation of the statute in a Court of law, and that the Minister would of course be prepared to give every facility to him for the purpose of obtaining a judicial ruling on the point.

In those circumstances the question, and the only question, is whether an appeal upon the points referred to lies to the Minister under s. 268 of the Public Health Act, 1875. By that section it is provided that: "Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them, or to declare such expenses to be private improvement expenses, he may, within twenty-one days after notice of such decision, address a memorial to the Local Government Board, stating the grounds of his complaint, and shall deliver a copy thereof to the local authority; the Local Government Board may make such order in the matter as to the said Board may seem equitable, and the order so made shall be binding and conclusive on all parties." Undoubtedly these provisions are of a very comprehensive character.

It is said, however, that on the true interpretation of certain sections in the Private Street Works Act, 1892, there cannot be an appeal to the Minister upon the question raised in this case. Nay, more, it is said that, so far as matters arising under the Act of 1892 are concerned, although s. 268 of the Act of 1875 is not expressly repealed, it is in effect rendered of no account, inasmuch as the whole opportunities of appeal are dealt with and exhausted in the specific provisions of the later Act. In the Act of 1892 a clear distinction is drawn between two different modes of apportionment. These two modes of apportionment appear from s. 10 of the Act.

The earlier part of that section provides: "In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises." In that part of the section, however, the words are inserted "unless the urban authority otherwise resolve," and the section then goes on to provide "but the local authority may, if they think just, resolve that in settling the apportionment regard shall be had to the following considerations; (that is to say,) (*a.*) the greater or less degree of benefit to be derived by any premises from such works; (*b.*) the amount and value of any work already done by the owners or occupiers of any such premises." The section thus provides that unless the urban authority resolve to take a particular course the expenses are to be apportioned without qualification according to the frontage of the respective premises; but that the urban authority may resolve to take that course and to apportion with regard to the considerations mentioned. It was therefore open to the borough council as urban authority to take the matter out of the general rule by passing the exceptional resolution, and by so doing to substitute the second basis of apportionment for the first basis of apportionment; but the borough council did not take that course. The scheme of the Act is that after notice to the urban authority objections to the proposed works may be taken in a particular way. Sect. 7, after providing for notice, sets out in great detail, and evidently in the most careful detail, the grounds upon which objections may be taken within the time limited. "During the said month any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may, by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds," and there follow grounds (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*). The words of (*f*) are important: "That the provisional

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apportionment is incorrect in respect of some matter of fact to be specified in the objection or (where the provisional apportionment is made with regard to other considerations than frontage as hereinafter provided)"—that is to say as provided by s. 10—"in respect of the degree of benefit to be derived by any persons, or the amount or value of any work already done by the owner or occupier of any premises." To put the matter in another way, so far as s. 7 is concerned, there may not be an objection upon the ground that the provisional apportionment is incorrect in respect of the degree of benefit to be derived by any premises or the amount or value of any work already done by the owner or occupier of any premises unless the provisional apportionment has been made with regard to other considerations than frontage as provided by s. 10.

In view of these provisions it is said that a resolution of the urban authority in that behalf is a condition precedent to the adoption of what I have described as the second method of apportionment, that in the present case that condition precedent has not been fulfilled, that therefore the kind of criticism or objection sought to be made by Mr. Aldridge could not be made under the Act of 1892, and that it follows that it is not possible for him to make that criticism or objection by way of appeal to the Minister of Health under s. 268 of the Act of 1875, inasmuch as all powers of appeal or objection are now to be found in s. 7 of the Act of 1892. Speaking for myself, I may say that I should be very reluctant to arrive at any conclusion which even seemed to tend in the direction of impairing the autonomous power of a local authority whose resolution is a condition precedent to a certain course. Local authorities are vested with great powers because in practice they show themselves to be worthy of them, and their discretion is not lightly to be diminished in any degree whatsoever. It is not, however, here said that it is the function of the Minister of Health to direct the local authority to pass the resolution which they might have passed but have abstained from passing. What is said is that the Minister of Health under the provisions of s. 268 of the Act of 1875 may make

such order in the matter as may seem to him to be equitable. In other words he may, if he thinks it equitable, deal with the question of quantum as it might have been dealt with if the local authority had not refrained from passing the resolution contemplated by s. 10 of the Act of 1892. Is that course open to him? One thing at any rate is quite clear—namely, that the Act of 1892 does not expressly repeal any provision contained in s. 268 of the Act of 1875. Great stress, however, was laid by the Attorney-General and by Mr. Montgomery upon the words of s. 8, sub-s. 2, of the Act of 1892. "No objection which could be made under this Act shall be otherwise made or allowed in any Court proceeding or manner whatsoever." In order to interpret those words correctly it may be a little important to consider the context in which they occur. It is true that s. 1 of the Act of 1892 provides that the Act shall be construed as one with the Public Health Acts. But when one comes to s. 8, sub-s. 1, it is interesting to observe that in the opening words of that sub-section the objections referred to in the highly detailed provisions of s. 7 are referred to as objections made "as in this Act mentioned." To read the whole sentence: "The urban authority at any time after the expiration of the said month may apply to a Court of summary jurisdiction to appoint a time for determining the matter of all objections made as in this Act mentioned"—that must mean in the Private Street Works Act, 1892—"and shall publish a notice of the time and place appointed, and copies of such notice shall be served upon the objectors; and at the time and place so appointed any such Court may proceed to hear and determine the matter of all such objections"—that is to say objections made as in this Act of 1892 mentioned. It is after those phrases and it is in that context that one gets sub-s. 2 expressed in the words which I have read. Looking at these words in the place where they occur, and in relation to all that has gone before them, I think it would be a straining of the natural and ordinary meaning of the words to say that "no objection which could be made under this Act" should be construed as "no objection which could be made

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under this Act or under the Public Health Acts with which by s. 1 it is to be construed." If that larger meaning of s. 8, sub-s. 2, had been contemplated by the Legislature, it would have been easy, in one or other of various ways, to express that meaning beyond doubt. It might have been done by leaving out certain words from sub-s. 2—namely, the words "under this Act." It might have been done by adding another sub-section as sub-s. 3. In my opinion, and I confess that my view of the matter has undergone modification in the course of the able argument which has been presented to the Court, it is significant that this sub-section not only does not contain any provision by way of repeal of s. 268 in the Act of 1875, but does import and repeat in this context the words "no objection which could be made under this Act."

I think, therefore, that the argument that the provisions of s. 268 of the Act of 1875 have been superseded or rendered nugatory by the provisions as to objections contained in the Act of 1892, fails, and that an appeal does lie to the Minister of Health upon such a matter as that which is contained in the memorial of Mr. Aldridge. It is an appeal to the Minister to make an order which appears to him to be equitable, notwithstanding that the local authority has refrained from passing the resolution contemplated by s. 10.

It may be, as has been suggested, that in certain other respects also, in particular with reference to s. 10 and s. 11 of the Act of 1892, such an appeal remains, but it is not now necessary to decide that point.

As for the merits of the case, I express no opinion, and I do not even desire to suggest one. The Minister may conceivably say that he sees no reason for going behind the decision of the local authority, but he may take another course and say that although the resolution contemplated by s. 10 has not been adopted, nevertheless it is equitable in the particular circumstances that the matter should be treated, so far as Mr. Aldridge is concerned, much as if it had been adopted.

It is not, I think, seriously suggested that the Minister

should be invited to request or to direct the local authority to pass that resolution. What is asked is that looking at all the circumstances and the history of the matter, he should make an equitable order taking into account the matters mentioned in (*a*) and (*b*) in s. 10, notwithstanding the absence of the resolution.

This question whether an appeal in such a case and upon such a matter to the Minister of Health remains, is a question which has been long discussed to some extent, or, at any rate, has often appeared to be approached. References to it are to be found in the cases, to take them in chronological order, of *Hayles* v. *Sandown Urban Council* (1); *Pearce* v. *Maidenhead Corporation* (2); and *Bridgwater Corporation* v. *Stone.* (3) The development of the observations to be found in these cases is not without interest. In the first case, in the year 1903, certain phrases were used, which apparently gave rise to some misunderstanding. In the second case, in the year 1907, that misunderstanding was removed, and in the third case, in 1908, a judicial opinion was expressed freed from any possibility of misunderstanding.

In these circumstances and for these reasons I have come to the conclusion, not without hesitation but clearly after listening to the arguments, that the right of appeal contended for by Mr. Aldridge still remains, and that this rule ought to be made absolute.

AVORY J. I am of the same opinion. We have nothing to do upon this application with the merits of the question which the applicant desires to raise before the Minister of Health, nor does our judgment in any way indicate what the result of an appeal to the Minister of Health should be if it lies. The sole question here is whether the appeal given by s. 268 of the Public Health Act, 1875, still survives in a case like the present. It is not disputed that there has been here a decision of the local authority in a case in which the local authority are empowered to recover in a summary

(1) [1903] 1 K. B. 169, 175. (2) [1907] 2 K. B. 96, 100.
(3) 72 J. P. 487, 489.

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manner expenses incurred by them, or to declare such expenses to be private and improvement expenses. That decision is a decision which appears in the exhibits in this case as a resolution passed at a meeting of the borough council, that the private street within the borough known as Orchard Road shall be sewered, levelled, paved, metalled, flagged, channelled, and made good and provided with proper means for lighting; and further that the specifications, plans, sections, estimate and provisional apportionment prepared by the borough surveyor and then submitted should be approved. The apportionment approved by the resolution shows on its face that it is an apportionment based on frontage. That being the decision of the local authority, that these works shall be done, and that the expense shall be apportioned on frontage, the applicant here is a person, it is not disputed, who deems himself aggrieved by that decision. The case therefore comes plainly within the words of s. 268, unless the right of appeal given by that section has been taken away by the Private Street Works Act, 1892. It is not suggested that it has been taken away in any other way than by some provision which appears in that Act, and the only provision in that Act which it is said deprives the applicant of his right of appeal is to be found in s. 8, sub-s. 2, of that Act. The words of that sub-section are: "No objection which could be made under this Act shall be otherwise made or allowed in any Court proceeding or manner whatsoever." There are two ways in which that sub-section can be read. It may be read as meaning no objection which can be made under this Act. That is under the Act of 1892. That would be prima facie its natural meaning, for when the Act speaks of "this Act" it is to be presumed that it refers to itself and not to some other Act. If the sub-section is read in that way then it is conceded that the objection made by the appellant is not, in the circumstances of this case, one of the objections which could be made under s. 7 of the Act of 1892, and therefore it is not one which could be made under that Act. Read, therefore, in that way it is obvious that these words cannot exclude the right of appeal under the Act of 1875.

But then it is said that because by s. 1 of the Act of 1892 that Act is to be read as one with the Act of 1875, then s. 8, sub-s. 2, may be read in this way: "No objection which can be made under the Act of 1875 shall be otherwise made or allowed." But to read it in that way is fatal to the argument of Mr. Montgomery, because he admits that the objection is not one which could have been made under the Act of 1875. Consequently, whichever way s. 8, sub-s. 2, be read, there is, in my opinion, nothing to justify the contention that that sub-section by implication takes away the right of appeal conferred by s. 268 upon any person who deems himself aggrieved by a decision, which undoubtedly this was, of the local authority.

For these reasons I agree that this order nisi ought to be made absolute.

SHEARMAN J. I agree. When a local authority adopts the provisions of the Private Street Works Act, 1892, in my judgment there are still some decisions of the local authority which are subject to review on equitable grounds by the Minister of Health under s. 268 of the Public Health Act, 1875. There are those decisions which are not covered by the jurisdiction conferred upon the justices by ss. 7 and 8 of the Act of 1892. Where the justices' jurisdiction extends the jurisdiction of the Minister of Health has gone: where the justices' jurisdiction does not extend, the jurisdiction of the Minister of Health remains. For those reasons I think this order nisi ought to be made absolute.

Order absolute.

Solicitor for Minister of Health: *The Solicitor to the Ministry of Health.*

Solicitors for the borough council: *Sharpe, Pritchard & Co., for the Town Clerk, High Wycombe.*

Solicitors for the applicant: *Ward & Melliar Smith, for Reynolds & Son, High Wycombe.*

J. R.

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June 18, 19.

GRAINGER *v.* MAXWELL AND OTHERS.

Revenue—Income Tax—Exchequer Bonds and War Loan Securities—Redemption of Exchequer Bonds before beginning of Year of Assessment—Interest received in previous Year—Computation of Tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case III., rr.* 1, 2.

The Income Tax Act, 1918, Sch. D, Case III., provides that tax shall be charged in respect of the income described in the rules applicable to that Case, and the rules provide (inter alia): (1.) that the tax shall extend to interest on money and certain other kinds of interest and profits including "(*f*) interest on any Exchequer bonds issued under the authority of the Treasury . . . . and on any securities issued under the War Loan Acts . . . . in cases where such interest is paid without deduction of tax"; and (2.) that the tax shall be computed in each case on the full amount arising within the year preceding the year of assessment.

A taxpayer was assessed to income tax for the year ending April 5, 1921, under the above provisions in a certain sum in respect of untaxed interest on certain Exchequer bonds, certain war loan securities, and certain money on deposit. She had held and received interest from each of these items of property in the preceding year, but in that year the Exchequer bonds were redeemed and no interest was thereafter received therefrom, and in the year of assessment she held and received interest from the other items of property only:—

Held, that, as the taxpayer had ceased to hold or to receive interest from the Exchequer bonds before the beginning of the year of assessment, she could not in that year be assessed to income tax in respect thereof, notwithstanding that in holding and receiving interest on the war loan securities in that year she was still holding and receiving interest from part of the holding of Exchequer bonds and war loan securities taken together, which she had held and received interest from in the preceding year; and consequently that the amount of the assessment should be reduced accordingly.

Brown v. *National Provident Institution* [1921] 2 A. C. 222; [1920] 3 K. B. 35 principles applied.

CASE stated by Commissioners for the General Purposes of the Income Tax Acts.

In the year ended April 5, 1920, the Hon. Mrs. H. Maxwell, deceased, held and received income from property of the following descriptions—namely, certain 6 per cent. Exchequer bonds issued under the authority of the Treasury during the war; certain securities issued under the War Loan Acts, 1914 to 1917—namely, 5 per cent. war stock, 1929–1947, and 5 per cent. national war bonds, 1928; and certain money

on deposit. The said Exchequer bonds were redeemed in February, 1920, and no interest was thereafter received therefrom, but Mrs. Maxwell continued to hold and was in receipt of income from the securities issued under the War Loan Acts during the year ended April 5, 1921.

An assessment for the year ended April 5, 1921, was made upon Mrs. Maxwell under the Income Tax Act, 1918, Sch. D, Case III., in the sum of 1170*l.* 10*s.* in respect of untaxed interest on the above mentioned items of property. It was admitted that the said assessment consisted of two parts—namely, 716*l.* 10*s.* interest on the said Exchequer bonds and war loan securities, and 454*l.* interest on deposit, being the respective amounts received in the year ended April 5, 1920. It further appeared that the item of 716*l.* 10*s.* included a sum of 300*l.* interest on Exchequer bonds, which interest ceased on February 2, 1920.

On February 3, 1922, Mrs. Maxwell appealed against the assessment to the Commissioners.

It was contended on behalf of Mrs. Maxwell that she could not be liable in the income tax year 1920–21 in respect of interest on the Exchequer bonds, as that source of income had ceased before the beginning of that income tax year; and, further, that neither the receipt of interest from the said war loan securities nor the holding of these securities in the year of assessment made her liable to assessment upon the Exchequer bond interest.

It was contended by the inspector of taxes, Mr. J. F. Grainger, that the contentions on behalf of Mrs. Maxwell were not well founded, and that the said assessment was rightly made in 1170*l.* 10*s.*, being the full amount of interest received from the said items of property within the previous year.

The Commissioners, being of opinion that, as the interest from the Exchequer bonds had ceased before the beginning of the year of assessment, and the source of income had ceased, the holder could not be assessed on the sum representing that interest, reduced the assessment to 870*l.* 10*s.*

The inspector of taxes required the Commissioners to state

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the present case. Mrs. Maxwell having died, the proceedings on her part were continued by her executors, the present respondents.

Sir D. Hogg A.-G. and *R. P. Hills* for the appellant.

Latter K.C. and *Cyril King* for the respondents.

In the course of the argument the following cases were discussed: *Brown* v. *National Provident Institution* (1) and *Whelan* v. *Henning.* (2)

ROWLATT J. It was decided in the case of *Brown* v. *National Provident Institution* (1), that in assessing for income tax under the Income Tax Act, 1918, Sch. D, Case III., the liability to assessment depended upon there being in the year of assessment profits of the kind assessed. The decision was that the liability depended upon the existence of profits in that year, and that recourse to the previous year did not arise for the purposes of measurement where there was nothing in the year of assessment to measure. That was a case relating to profits from discounts where no discounting operations had taken place in the year of assessment, though profits had been made from operations of that kind in the preceding year. In the subsequent case of *Whelan* v. *Henning* (2), which came before me and went to the Court of Appeal, and in which, I understand, an appeal to the House of Lords has been lodged, the same principle has been applied to a case where the taxpayer was the owner of a foreign possession, shares, that is to say, in a company domiciled outside the United Kingdom. He had received dividends from the shares in the year preceding the year of assessment, and he continued to hold the shares in the year of assessment, but there was no dividend from them in that year, and it was held that, as liability depended upon the existence of some profit in the latter year, he was not liable to be assessed in that case.

The present case is this. There was a holding of Exchequer

(1) [1921] 2 A. C. 222; [1920] 3 K. B. 35. (2) [1925] 1 K. B. 387.

bonds and of war loan securities not taxed at the source. They were both held in the year preceding the year of assessment. The Exchequer bonds had ceased to be held before the commencement of the year of assessment. The question arises whether in those circumstances, there being some income in the year of assessment from the subject matter consisting of Exchequer bonds and war loan grouped together, the whole income in the previous year from those two securities grouped together can be used as the measure of the taxpayer's liability in the year of assessment. In other words, what is the unit of measurement when one comes to the consideration of the profits to be measured in the year of assessment ?

In the case of *Whelan* v. *Henning* (1) the Court of Appeal pointedly remarked that it was confining itself to a decision of the specific case before it. I am glad of that encouragement to refrain from discounting before maturity the successive problems which will inevitably require to be dealt with hereafter in detail. It is sometimes difficult, no doubt, while dealing with the case before one to avoid saying something, whether one likes it or not, which in fact decides another case ; but in this instance I shall endeavour, if possible, to avoid doing that. Without infringing upon the salutary principle, that one ought in general to confine oneself rigidly in words to the decision of the case before one, I think I may point out that the problem here presented did exist in its essence, though on a small scale, before the decision in *Brown* v. *National Provident Institution.* (2) Under Cases I. and II., as I understand it, it has never been contended by the Revenue that if the subject has ceased to exercise a trade or a profession, he can be taxed in the succeeding year upon the profits of the previous year of his trading or professional career. A man may have two professions or two trades and discontinue one of them, and, so far as I know, it has never been contended that inasmuch as he still has a trade or a profession in the year of assessment, he can be taxed in

(1) [1925] 1 K. B. 387. (2) [1921] 2 A. C. 222 ; [1920] 3 K. B. 35.

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that year on the profits of the other trade or profession which he happened to carry on in the previous year or three years, but has ceased to carry on. So in the case of foreign possessions, that is possessions out of the United Kingdom, I do not think it has ever been suggested by anybody—though, if it has, I am not deciding that the suggestion would be wrong—that, if a person had ceased to own or to receive profits from any foreign possessions at all before the beginning of the year of assessment, he could be assessed upon the profits from foreign possessions which he had in the previous three years or the previous year. A man may, however, have many foreign possessions, both within and without His Majesty's dominions, or in different dominions, or in different foreign countries; he may have shares in companies similarly distributed throughout the world. If he parts with some of those possessions either during the year before the year of assessment or during the three years preceding the year of assessment, the question has always existed, although so far as I know it has never been litigated, whether those that he has parted with drop out of the sources from which the average income is to be calculated or whether they do not. That is the same problem as is presented here, though with reference to a different case, as to which I say nothing. I only mention it because I think it is as well to appreciate, when one is dealing with a particular case of this kind, the whole bearing of the principle under discussion, although one does not decide anything about the application of it in other particular cases.

To come now to this case, the widest proposition in favour of the Crown would be that the Case was the unit of measurement, and therefore that if the subject has any source of income under Case III. in the year of assessment, the whole of the income which he may have had in the year before under Case III., from various sources, should be brought in. That proposition would cover the claim of the Attorney-General, but it would do more than cover it in this case. I am unable to accept that proposition, though I think I am bound to deal with it. In the case of *Brown* v. *National Provident*

Institution (1) this point was not within the purview of the decision of the House of Lords; but it seems to me that in the Court of Appeal at least one of the Lords Justices indicated in his judgment that under Case III. the profits from discounts could not be blended with profits received in the previous year from other sources mentioned in the case for the purpose of estimating the profits of the year of assessment. If I may respectfully say so, it seems to me that that is the right view. I think I have the guidance of what the Lord Justice said in the matter. The proposition at the opposite extreme, the proposition most favourable to this and every other subject, would be to say that the identical securities, the identical Exchequer bonds, the identical items of war loan, if these are itemised, must remain to the year of assessment, in order that profits from them can be taxed in that year. Where there is only stock I do not think there can be said to be any such thing as identity of the stock, since the stock consists merely of an aliquot part of the stock in the books. But there is another kind of identity which will have to be considered some day, and that is the identity of quantity. Supposing that a person has 5000*l.* war loan in the year preceding the year of assessment, and only 2000*l.* in the year of assessment, what then? That is a difficult question, though I do not think I need decide it now. I have stated a simple case. I will state a somewhat more complicated case, which raises the same question, but perhaps brings one more vis-a-vis with it. Take the case of a widow lady with 500*l.* a year in war loan of her own and 500*l.* a year in war loan under a marriage settlement which is to go over upon her re-marriage. She marries again, carrying with her her own war loan only. Is her second husband liable for assessment in respect of the 500*l.* a year which she has sacrificed in order to enjoy his marital society? I only put that case as exemplifying in a practical and striking way the problems which exist in this part of the Act.

In this case the only question is whether I ought to group

(1) [1921] 2 A. C. 222; [1920] 3 K. B. 35.

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together Exchequer bonds and war loan which are mentioned together in the rules applicable to Case III., r. 1 (*f*) ? How am I to group the various things under Case III. if I am not to group the whole of them together, as I do not think I am entitled to do ? It was suggested by Mr. Hills, though I do not think the Attorney-General put it in that way, that I ought to group them together, at any rate in so far as they consist of income from interest, but I do not see that I have any authority to do that under the Act. Interest is a subject matter of taxation, no doubt, but it is a subject matter of taxation which runs outside of this Case, and even outside of this Schedule, because interest includes the profit which results from securities coming under Sch. C. I therefore find enormous difficulty in saying that interest can be the denomination of a group within not only a Schedule, but within a Case in one Schedule.

Am I to group these items together because they are together in para. (*f*) of r. 1 under this Case ? It seems to me that this form of printing does not help me. I do not think that the mere arranging of the names of items under the headings (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), varies the meanings of the words, especially in an Act which is a consolidating Act. Exchequer bonds and securities issued under the War Loan Acts are here separately mentioned by name. I cannot find any guidance which will authorize me in putting together things that are separately mentioned as taxed.

In my judgment the Commissioners were therefore right in treating Exchequer bonds and war loan securities as separate heads of income for the purpose of the application of the principle which was laid down in *Brown* v. *National Provident Institution.* (1)

A further question will arise, I may point out, as to whether securities issued under the War Loan Acts, 1914 to 1917, which are mentioned together, are a group, or whether they are to be looked at separately. I mention it, but I say nothing about it.

(1) [1921] 2 A. C. 222; [1920] 3 K. B. 35.

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In these circumstances I hold that this appeal fails, and must be dismissed with costs.

Appeal dismissed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Hunters.*

J. R.

LAURIE AND MOREWOOD *v.* JOHN DUDIN AND SONS.

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June 18; *July* 3, 15.

Sale of Goods—Delivery Note for Portion of Bulk held by Warehousemen—No Selection or Delivery Warrant by Seller—Reception of Note by Warehousemen—Absence of Acknowledgment—Title of Buyer—Estoppel—Delivery Note—"Document of title to goods"—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 25, 47.

The defendants, warehousemen and wharfingers, held 600 quarters of maize belonging to A., who sold 200 quarters thereof to W., who sold them to the plaintiffs, giving to the latter a delivery note, which they lodged with the defendants. The defendants did not acknowledge it or object to it, but some days later, no weighing out or appropriation of the 200 quarters having taken place, A. stopped delivery. It was contended that on the sale to W. the latter became tenants in common with A. of the 600 quarters, with the right in W. to assign their interest therein to the plaintiffs, although no appropriation of the 200 quarters had taken place:—

Held, overruling this contention, that the plaintiffs had no claim to the maize.

Whitehouse v. *Frost* (1810) 12 East, 614 not followed.

Held, further, that the defendants and A. were not estopped in the above circumstances from denying that the plaintiffs were the owners of the 200 quarters of maize.

Held, further, that the delivery note handed to the plaintiffs by W. was not a document of title to goods within the meaning of the Sale of Goods Act, 1893, and that, consequently, the transaction did not come within the protection afforded by ss. 25 and 47 of that Act to bona fide transferees of documents of title to goods.

Ant. Jurgens Margarinefabrieken v. *Louis Dreyfus & Co.* [1914] 3 K. B. 40 distinguished.

ACTION tried by Sankey J.

The defendants, John Dudin & Sons, warehousemen and wharfingers, had lying at their wharf on February 2, 1925, some 618 quarters of Plate maize in bulk, the property of

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J. T. Alcock & Sons. On that day Alcock & Sons sold 200 quarters of the maize to John Wilkes & Son, Ld., and gave them a delivery note. On February 18, 1925, John Wilkes & Son, Ld., sold the 200 quarters of maize to the plaintiffs, and gave them a delivery note in the following terms: "To Mr. Superintendent or Chief Officer of Dudin's Wharf, Montreal Granary. Deliver to Messrs. Laurie & Morewood 200 quarters Plate maize, weighed 480 lbs. All charges and risk to buyers after February 22, 1925." This was lodged with the defendants. On February 21, John Wilkes & Son, Ld., handed the delivery note of February 2 to the defendants, who noted it in their stock book. The 200 quarters would have come from the said 618 quarters. On February 26, 1925, Alcock & Sons instructed the defendants to stop the delivery of the 200 quarters, and immediately afterwards and on the same day the defendants received from the plaintiffs the following letter (dated February 25): "Dear Sir,—Delivery order 18–2–1925. Two hundred quarters Plate maize ex s.s. *Harperley*, issued in our favour by Messrs. John Wilkes & Son, Ld. Will you please let us have a warrant for the above, and oblige. Yours faithfully, Laurie & Morewood." The defendants replied by a letter of the same date: "Re D/O. 18/2/25 X Messrs. John Wilkes & Son, Ld., 200 quarters of maize, ex *Harperley*. In reply to your letter of the 25th asking for a warrant on the above, please note we cannot issue. The sellers of this maize to John Wilkes & Son, Ld., have stopped delivery, and so we must refer you to your sellers."

The plaintiffs thereupon brought this action. The contentions of the parties sufficiently appear in the judgment.

Le Quesne K.C. and *Trapnell* for the plaintiffs.
Claughton Scott K.C. and *Werninck* for the defendants.

Cur. adv. vult.

1925. July 16. SANKEY J. read the following judgment: The plaintiffs' claim is for a declaration that they are entitled

to the possession of 200 quarters of maize now held by the defendants and that the defendants are bound to give delivery thereof in accordance with the plaintiffs' orders. Alternatively they claim the value of the maize and damages for the detention thereof. The defendants deny these allegations, and contend that no property in the maize ever passed to the plaintiffs.

The facts are as follows. The defendants are warehousemen and wharfingers, and on or about February 2 last the firm of Messrs. J. T. Alcock & Sons had lying at the defendants' wharf some 618 quarters of Plate maize in bulk. Upon that day Alcocks sold to John Wilkes & Son, Ld., 200 quarters of the maize and gave a delivery note to Wilkes. Upon February 18 Wilkes sold the 200 quarters to the plaintiffs and gave them a delivery order, which was in the following terms: "To Mr. Superintendent or Chief Officer of Dudin's Wharf, Montreal Granary. Deliver to Messrs. Laurie & Morewood 200 quarters Plate maize, weighed 480 lbs. All charges and risk to buyers after February 22, 1925." Then there are certain conditions, which I need not here refer to. Alcocks handed to the defendants on February 21 the delivery note of February 2, which the defendants noted in their stock book. The 200 quarters would have come out of the 618 quarters on delivery. Upon February 26 Messrs. Alcock instructed the defendants to stop delivery of the 200 quarters. Subsequent to those instructions the defendants received from the plaintiffs the letter of February 25, which was in the following terms: "Dear Sir,—Delivery order 18/2/1925. Two hundred qrs. Plate maize ex s.s. *Harperley* issued in our favour by Messrs. John Wilkes & Son, Ld. Will you please let us have a warrant for the above, and oblige. Yours faithfully, Laurie & Morewood." They replied by a letter of even date as follows: "In reply to your letter of the 25th asking for a warrant on the above, please note we cannot issue. The sellers of this maize to J. Wilkes & Son, Ld., have stopped delivery, and so we must refer you to your sellers." The defendants refusing to give delivery of the maize to the

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plaintiffs, the present action is brought, and the plaintiffs contend that they are entitled to sue in conversion and detinue, because either (*a*) the maize was their property, or (*b*) was property to which the plaintiffs were entitled to immediate possession.

The plaintiffs take three points: (1.) That the goods are their property, because the property passed to them by reason of the fact that they had a delivery order therefor, which had been lodged with and not objected to by the defendants, and that they became tenants in common of the whole mass of grain lying at the defendants' warehouse with a right to give instructions for the delivery of the proportion covered by their contract. (2.) That the defendants and Messrs. Alcock are estopped from alleging that the plaintiffs are not the owners. (3.) That by reason of ss. 25 and 47 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), they are entitled to succeed.

Originally the plaintiffs relied upon the first of these contentions only. Subsequently, by a letter of June 11, they relied upon the estoppel point. When they got into Court they raised yet another point, that they were entitled to succeed by the custom of the trade. The hearing was adjourned to enable them to formulate their contention as to the custom and to call evidence thereon.

It will be convenient to deal with the custom point first. The custom set up by the plaintiffs is contained in a letter of their solicitors of June 22, as follows: "The following are the particulars of the custom relied upon. The custom of the trade with respect to the delivery of grain in bulk in the hands of a wharfinger is that if the person in whose favour a delivery order is issued presents it and claims delivery forthwith, the wharfinger must give delivery assuming he has on hand to the credit of the seller sufficient grain to do so, regard being had only to delivery orders previously lodged. If, on the other hand, the delivery order is sent through the post or by messenger, the person in whose favour it is issued is entitled to assume that the wharfinger will hold and deliver the particular quantity to that person's sub-order, unless

the wharfinger forthwith, i.e. within 24 hours, either returns the delivery order or in any other way intimates that he cannot accept it. It is not the practice to separate the quantity mentioned in each delivery order." A number of witnesses were called upon it. [His Lordship then reviewed the evidence called by the plaintiffs and defendants, and in the result held that the custom had not been proved.]

I now deal with the other points. As to (1.), that the goods are the property of the plaintiffs because the property passed to them by reason of the fact that they had a delivery order therefor which had been lodged with and not objected to by the defendants and that they became tenants in common of the whole mass of grain lying at the defendants' warehouse, with a right to give instructions for the delivery of the proportion covered by their contract, it will be remembered that at the time the delivery order was given for 200 quarters it was an order on a larger quantity in bulk. No weighing over ever took place and no delivery warrant was obtained by or given to the plaintiffs. It was simply a delivery order for 200 quarters of a whole undistributed mass of 600 quarters. It may be that the law upon this matter in Canada and the United States is different from what it is in England. The effect of the law in those countries is stated as follows in Benjamin on Sale, 6th ed., p. 380: "Cases in which grain stored in elevators, or other public warehouses, is sold are looked upon in Canada and the United States in a light peculiar to themselves. When various owners voluntarily mix their goods by delivery to an elevator, the warehouseman is regarded as their common agent. They have become, by agreement, inferred from the method of storage and trade usage, tenants in common of the whole mass, each being entitled to such a proportion thereof as the quantity stored by him bears to the whole. A sale by such an owner is the sale of his interest in the undivided mass. Separation of the goods sold from the bulk, or actual delivery thereof to the buyer, is not necessary to pass that interest, which vests in the buyer by the seller's orders on the warehouseman to

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deliver the quantity sold to the buyer, and an acceptance of the order by the warehouseman. The rule is the same whether the various proprietors are numerous, or whether the seller and the buyer are the only two owners. And the interest so vested is sufficient to enable the buyer to bring trover for the undivided quantity against the seller or warehouseman." No doubt some countenance is lent to such a doctrine in English law by the case of *Whitehouse* v. *Frost* (1), but in my view that is not now regarded as a correct decision. It has had a distinguished career and has been doubted on more than one occasion. In the book to which I have referred, Benjamin on Sale, 6th ed., p. 378, footnote (*t*) is as follows: "The author here proceeds to consider *Whitehouse* v. *Frost* (1), which conflicts with the principle of the other cases. As it has been frequently disapproved, though followed in America, it may be treated as of no authority here." Further than that, I think Scrutton L.J. was of this opinion in the recent case of *Sterns, Ld.* v. *Vickers* (2), where he says, quoting from Bayley B. in *Gillett* v. *Hill* (3): "'Where there is a bargain for a certain quantity" of goods "ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit, then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable before that is done.'" There the quotation ends and the learned Lord Justice goes on: "Nor probably will the acquisition of such an undivided interest pass the property, so as to entitle the purchaser to sue for a conversion, in a case where the power of appropriation is, as here, in a third party." I am therefore against the plaintiffs on their first contention.

As to (2.), that the defendants and Messrs. Alcock are estopped from alleging that the plaintiffs are not the owners, no doubt property can be acquired by estoppel. The subject is dealt with in Blackburn on Sale, 3rd ed., p. 203. Blackburn J. himself was a party to the decision in *Knights* v. *Wiffen* (4), one of the leading cases on the subject. In one

(1) 12 East, 614.
(2) [1923] 1 K. B. 78, 84.
(3) (1834) 2 Cr. & M. 530, 535.
(4) (1870) L. R. 5 Q. B. 660.

aspect estoppel does not create a title, but merely enables a plaintiff to rely upon the doctrine and to treat the property in question as if it had been transferred. There are many instances in the various reports. The plaintiffs cited *Harman* v. *Anderson* (1); *Stonard* v. *Dunkin* (2); *Gillett* v. *Hill* (3); and *Woodley* v. *Coventry*. (4) Those cases are illustrations of the application of the doctrine. It is to be observed, however, that each of them depended upon its own particular facts, and in each one of them the defendants had done either something which indicated that the transitus of the property was at an end and that the property had passed, or something upon which the plaintiff had acted and relied, and consequently the Court held that they were prevented from alleging that the condition of affairs was different from that which they had led the plaintiff to believe it was.

In *Knights* v. *Wiffen* (5) Blackburn J. pointed out that Wiffen had recognized Knights as a person entitled to the possession of the barley. In *Harman* v. *Anderson* (1) the defendants had transferred the whole of the goods in question in their books to the name of the bankrupt, and actually debited him with warehouse rent, and Lord Ellenborough held that the right to stop in transit was gone. In *Stonard* v. *Dunkin* (2) the defendants gave a written acknowledgment that they held the malt on plaintiff's account, and plaintiff thereupon advanced 7500*l*. Lord Ellenborough held that under the circumstances the defendants had attorned to the plaintiff. In *Gillett* v. *Hill* (6) Lord Lyndhurst pointed out that the case was decided by the verdict of the jury on the facts, and Bayley B. pointed out (7) that it was a delivery order for twenty sacks specifically and that five of them had been delivered, the dispute being as to the remaining fifteen, and that there was evidence upon which the jury could find for the plaintiff. In *Woodley* v. *Coventry* (4) the plaintiff

(1) (1809) 2 Camp. 243.
(2) (1810) 2 Camp. 344.
(3) 2 Cr. & M. 530.
(4) (1863) 2 H. & C. 164.
(5) L. R. 5 Q. B. 660, 664.
(6) 2 Cr. & M. 530, 534.
(7) Ibid. 535.

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expressly inquired if the delivery order was correct and was expressly told "Yes" by the defendant, who accepted it, and consequent thereon the plaintiff paid part of the price.

I agree that estoppel may arise by a person leaving undone what he ought to have done, just as much as it may arise by his doing something which he ought not to have done. If, in the present case, the plaintiffs had been able to prove their custom and to show that if the wharfinger did nothing for twenty-four hours after receiving the delivery order, the person sending the delivery order was entitled to assume that the wharfinger would hold and deliver the particular quantity to that person's sub-order, it might have assisted them in their contention. I do not think that the mere fact that the defendants received the delivery order in question in the ordinary way of business without acknowledging it can be held to estop them from alleging that the plaintiffs are not the owners. There was no obligation upon them under the circumstances to acknowledge the receipt. There is no suggestion that they at any time said that they held the maize at the disposal of the plaintiffs, and there is no custom proved that after a lapse of twenty-four hours the plaintiffs were entitled to assume that if they heard nothing no stop order could be put on the goods. In my view the plaintiffs' second point fails.

As to (3.), that by reason of ss. 25 and 47 of the Sale of Goods Act, 1893, they are entitled to succeed, I do not think the case is within the sections cited. The plaintiffs relied upon the case of *Ant. Jurgens* v. *Louis Dreyfus & Co.* (1), but the facts there were entirely different. The document in question was a different one from the delivery note in the present case, and had been indorsed by Finckler & Co. and handed to the plaintiffs. I cannot hold that the delivery note under discussion was in law a document of title, nor, having regard to the evidence, do I think it is so regarded on the market. A bank, apparently, would require the

(1) [1914] 3 K. B. 40.

production of a delivery warrant, as distinguished from a delivery order, as security for money advanced.

In the result my judgment is for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Keene, Marsland, Bryden & Besant.*

Solicitors for defendants: *Sturton & Sturton.*

W. L. L. B.

M. ISAACS AND SONS, LIMITED, AND OTHERS *v.* COOK.

1925
July 24.

[1924. M. 2344.]

Defamation—Libel—Publication—Privilege—Report by High Commissioner to Prime Minister of Australia.

A report by the High Commissioner of Australia in the United Kingdom made in his official capacity to the Prime Minister of Australia in the execution of his duty and in pursuance of the powers conferred and the duties imposed upon him in that behalf under the High Commissioner Act, 1909, of the Commonwealth of Australia, and the instructions given to him by the Prime Minister of Australia, is absolutely privileged as being a communication relating to State matters.

A communication may be absolutely privileged as an act of State although it relates to commercial matters.

POINTS of law arising on the pleadings ordered to be set down for argument pursuant to Order XXV., r. 2.

The plaintiffs, who said they were at all material times the only companies or firms of green-fruit brokers carrying on business in the City of London and selling in the City of London Fruit Sale Room shipments of fruit on behalf of fruit shippers by public auction, alleged, by para. 3 of their statement of claim, that "the defendant falsely and maliciously wrote and published and caused to be written and published of and concerning the plaintiffs and each of them, and of and concerning the plaintiffs and each of them in the way of their said trade:—(i.) (*a*) in or about the month of November, 1923, in England, and/or in the alternative

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(*b*) between January 1, 1924, and April 2, 1924, in Australia, to the Prime Minister of Australia, the following words :— 'Oranges.—Two Victorian shipments were forwarded to the City [meaning the City of London Sale Room] for sale by auction. This did not prove to be a wise plan, as, in the first place, very low prices were realized and the fruit was bought by Covent Garden merchants, who in some cases made 100 per cent. on their purchases. Covent Garden is an established market, and buyers have got into the habit of looking to that centre to make their purchases; consequently the fruit sold at the City [meaning the said City of London Sale Room] was almost unheard of, and was practically at the mercy of traders, who did not enter into competition with one another and bought as cheaply as possible. . . . .' ''

The plaintiffs further alleged a publication by the defendant in April, 1924, of the words above set out to the members of the Federal Parliament; in certain Australian newspapers in April, 1924, in Australia and in the British Isles; in November, 1923, in England to the defendant's clerks or servants, who took down, transcribed, copied, addressed, and enclosed the document containing the words above set out; and in Australia to the secretary, clerk, or servant of the Prime Minister, who removed from its envelope and read the document containing the said words.

The plaintiffs alleged that by the said words the defendant meant that sales of fruit in the City of London Sale Room were practically unheard of, that fruit sold there was sold without any competition of buyers, was bought by a few traders and by the plaintiffs' competitors at ridiculously low prices, and resold by them at high profits, that no fruit shippers should sell their fruit there, and that no one ought to employ the plaintiffs as fruit brokers. By reason of the words complained of, the plaintiffs, and each of them, said they had been seriously injured in their character, credit and reputation, and in the way of their trade, and had been brought into public scandal and contempt, and they claimed damages.

The defendant admitted that he wrote and published to

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the Prime Minister in Australia the words complained of, but denied that they were defamatory. By para. 6 of his defence he said that "the said words were written and published to the Prime Minister of Australia in Australia under the following circumstances, and not otherwise. The defendant is and was at all material times the High Commissioner of the Commonwealth of Australia in the United Kingdom duly appointed under the High Commissioner Act, 1909, of the Commonwealth of Australia (No. 22 of 1909), and the said words were contained in a report made by him in his official capacity to the said Prime Minister in the execution of his duty and in pursuance of the powers conferred and duties imposed upon him in that behalf under the said Act, and the instructions and/or directions given to him by the Minister and/or Governor-General thereunder. The defendant will contend that by reason of the premises the publication of the said words is privileged, and that no action will lie against him in respect thereof." He further said that the report containing the words in question was ordered to be printed by the Federal Parliament of the Commonwealth, and he relied upon the Parliamentary Papers Act, 1908, of the Commonwealth (No. 16 of 1908), and contended that the publication was privileged, and that no action would lie in respect thereof. As to the alleged publication to clerks and servants, he said that it was made, if at all, in the reasonable, usual, and ordinary course of business, and was privileged. The alleged publication in newspapers in Australia was, he said, protected by the order of the Federal Parliament under the Parliamentary Papers Act, 1908, which also, he contended, protected the alleged publication in newspapers sold in England.

Sir John Simon K.C. and *Viscount Erleigh* for the plaintiffs.

Stuart Bevan K.C. and *Wilfrid Lewis* for the defendant. With regard to the first allegation by the plaintiffs—namely, that the defendant's report to the Prime Minister of Australia was published in England and in Australia, it is submitted that the despatch of the report from England did not constitute

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a publication here. In any view, however, the report is a document to which absolute privilege attaches. The defendant was appointed High Commissioner for Australia under the High Commissioner Act, 1909, of the Commonwealth Parliament, and, as such, he acts as representative and resident agent of the Commonwealth in the United Kingdom and is required by s. 4 of the Act to "carry out such instructions as he receives from the Minister respecting the commercial, financial, and general interests of the Commonwealth and the States in the United Kingdom and elsewhere." His duties were more particularly defined in the minute of January 17, 1910, relating to his appointment, by which he is required to "observe the course of public affairs, and take such action as may appear to him necessary to preserve or promote Australian interests; report to the Minister all matters coming to his knowledge likely to be of advantage to the Government," and "furnish to the Minister an annual report of the proceedings of his office." The report in question being prepared and despatched to the Prime Minister under those powers and instructions is a State paper within the rule laid down in *Chatterton* v. *Secretary of State for India*. (1) There the Court of Appeal decided that a communication relating to State matters made by one officer of State to another in the course of his official duty is absolutely privileged and cannot be made the subject of an action for libel. In a number of cases State documents have been held privileged from production: see *Home* v. *Bentinck* (2); *Anderson* v. *Hamilton* (3); *Smith* v. *East India Co.* (4); *Dawkins* v. *Lord Rokeby* (5); *Hennessy* v. *Wright* (6); and *Wright & Co.* v. *Mills* (7)—and on documents which are immune from production no action can be founded: see per Kay L.J. in *Chatterton* v. *Secretary of State for India*. (8)

The alleged publication to members of the Federal Parliament and in Australian newspapers is privileged by

(1) [1895] 2 Q. B. 189.
(2) (1820) 2 Brod. & B. 130.
(3) (1816) 2 Brod. & B. 156n.
(4) (1841) 1 Ph. 50.
(5) (1873) L. R. 8 Q. B. 255.
(6) (1888) 21 Q. B. D. 509.
(7) (1890) 62 L. T. 558.
(8) [1895] 2 Q. B. 189, 193.

the Parliamentary Papers Act, 1908, of the Commonwealth of Australia. Sect. 4 of that Act provides that no action shall lie against any person for publishing a document published under the authority of the Senate or of the House of Representatives, as this report was. Accordingly its publication in newspapers is protected in Australia, and no action is maintainable here in respect thereof: *Machado* v. *Fontes* (1), where it was laid down that no action will lie in this country in respect of an act done outside the jurisdiction if the act is not wrongful where it was done. The protection given by the Act of 1908 applies also to the publication in Australian newspapers sold in this country.

The alleged publication to clerks and servants, being made in the reasonable and ordinary course of business, gives no cause of action: *Boxsius* v. *Goblet Frères* (2); and *Edmondson* v. *Birch & Co.* (3)

Sir John Simon K.C. in reply. While a plausible argument in favour of the defendant may be drawn from *Chatterton* v. *Secretary of State for India* (4), that case, when closely examined, is not an authority in support of the proposition that the report now in question is absolutely privileged. In *Chatterton* v. *Secretary of State for India* (4) the communication complained of was made by the defendant to the Parliamentary Under-Secretary for India to enable him to answer a question in the House of Commons with regard to the treatment of the plaintiff by the Indian military authorities and government, and the actual decision was that the Secretary of State could not be sued for libel for giving that information to his colleague. That gives no support to the proposition advanced here that whenever an official makes any communication to another absolute privilege attaches to it. This wide extension of the doctrine was never suggested in *Adam* v. *Ward*. (5) In Fraser on Libel and Slander, 6th ed., p. 197, the proposition, which was approved by Lord Esher M.R. in *Chatterton* v.

(1) [1897] 2 Q. B. 231.
(2) [1894] 1 Q. B. 842.
(3) [1907] 1 K. B. 371.
(4) [1895] 2 Q. B. 189.
(5) [1917] A. C. 309.

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Secretary of State for India (1), that no action lies in respect of a "communication relating to State matters made by one Minister to another, or to the Crown," is in terms limited to communications relating to State matters. The report now complained of is not a communication within the category of those mentioned. It deals with a purely commercial question, not a State matter, and if absolute privilege is to be attached to it the case goes much further than any previous decision.

[*Stuart Bevan K.C.* The correspondence in question in *Smith* v. *East India Co.* (2) had reference to a commercial transaction, and it was held, on the ground of public policy, to be a privileged communication.]

That decision is really an authority in favour of the distinction for which I am contending, for there the correspondence which had passed between the East India Co. and the Commissioners for the affairs of India, owed its existence to the obligation imposed by the statute 3 & 4 Will. 4, c. 85, and that obligation was imposed for the public benefit; the correspondence thus related to State matters in the strict sense. In this case the defendant's position is not analogous to that of an ambassador; it is much more like that of a representative whose function is to make commercial reports. The action therefore should not be stopped in limine but should be left to be tried in the ordinary way. In any event, the points relating to publication in the newspapers cannot be disposed of at this stage.

ROCHE J. By an order of the Master certain issues raised by the defence in this action were ordered to be tried as preliminary issues, and pursuant to Order XXV., r. 2, the matter now comes before me.

The matters in issue raised by the defence may be shortly stated as follows: the action is brought by fruit brokers in the City of London against the defendant sued as an individual. He is, however, High Commissioner of Australia. It also appears, and, for the purpose of to-day, I have to assume

(1) [1895] 2 Q. B. 189, 191. (2) 1 Ph. 50.

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the truth of the allegations of the defence, that the defendant as High Commissioner made a report in his official capacity to the Prime Minister of Australia. The plaintiffs complain of certain statements in that report as making comparisons, which they regard not only as invidious but as defamatory, between the methods of the sale of fruit at Covent Garden and the sale of fruit at the City sale room where the plaintiffs conduct a part of their business. I am not concerned to try the question whether the words are defamatory of the plaintiffs; the sole question I have to decide is whether the expressions used by the defendant in his report are or are not absolutely privileged. The matter cannot be regarded as an indivisible whole. The statement of claim deals with various publications, and it may be that different considerations apply in the case of some of these.

The first publication complained of is a publication in London and in Australia to the Prime Minister of Australia; the second is a publication to members of the Federal Parliament of Australia; the third is a publication in certain newspapers in Australia and in this country; and the fourth and fifth publications complained of are those to the clerks or servants of the defendant in this country, through whom the production and issue of the report were arranged, and the publication to the clerk, secretary or servants of the Prime Minister in Australia, through whom the report was received and dealt with. Dividing the matters in that way I shall deal with each of them.

The principle applicable to such matters is stated thus in the following paragraph in Fraser on Libel and Slander, 6th ed., p. 196: "Everything written or said in the course of any naval or military proceeding is absolutely privileged. Thus, any defamatory statement made before a naval or military court-martial, no matter how untrue and malicious, is protected. Similarly no action lies in respect of such a statement in a report made in the course of military or naval duty. For reasons of public policy the same protection would no doubt be given to anything in the nature of an act of State, for example, to every communication relating to

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State matters made by one minister to another, or to the Crown." That paragraph was adopted by Lord Esher M.R. in *Chatterton* v. *Secretary of State for India* (1) as stating the law correctly. I also adopt it. The question then is whether the publication complained of is a communication of the nature referred to in that paragraph. By para. 6 of the defence the matter is put thus: "The defendant is and was at all material times the High Commissioner of the Commonwealth of Australia in the United Kingdom duly appointed under the High Commissioner Act, 1909, of the Commonwealth of Australia (No. 22 of 1909), and the said words were contained in a report made by him in his official capacity to the said Prime Minister in the execution of his duty and in pursuance of the powers conferred and duties imposed upon him in that behalf under the said Act and the instructions and/or directions given to him by the Minister and/or Governor-General thereunder. The defendant will contend that by reason of the premises the publication of the said words is privileged and that no action will lie against him in respect thereof." The Act of 1909 there referred to enacts, by s. 4, as follows: "The High Commissioner shall (*a*) act as representative and resident agent of the Commonwealth in the United Kingdom, and in that capacity exercise such powers and perform such duties as are conferred upon and assigned to him by the Governor-General; (*b*) carry out such instructions as he receives from the Minister respecting the commercial, financial, and general interests of the Commonwealth and the States in the United Kingdom and elsewhere." The instructions referred to in para. 6 of the defence are contained in a minute dated January 17, 1910, requiring the High Commissioner to "observe the course of public affairs, and take such action as may appear to him necessary to preserve or promote Australian interests; report to the Minister all matters coming to his knowledge likely to be of advantage to the Government . . . .; furnish to the Minister an annual report of the proceedings of his office." I hold that a report made in those circumstances by the defendant to the Prime

(1) [1895] 2 Q. B. 189, 191.

Minister of Australia is absolutely privileged. Sir John Simon for the plaintiffs contended that the report did not come within the category of documents mentioned in the paragraph I have read from Fraser on Libel and Slander. He argued that the documents there referred to are those relating to State matters only, and consequently that communications on commercial matters do not come within the rule there laid down. I am not concerned to say whether the principle stated in the paragraph covers all communications between officials. What I hold is that the fact that a communication relates to commercial matters does not of itself preclude it from being one relating to State matters. In *Smith* v. *East India Co.* (1) the subject matter of the document was commercial, but, nevertheless, it was held to be privileged from production. It is true that the question whether a document is immune from production is not quite the same as the question whether one who publishes a document is immune from an action for defamation, but Kay L.J. in *Chatterton* v. *Secretary of State for India* (2) deals with those questions as similar questions, each throwing light upon the other. He said (3): "In the case of *Home* v. *Bentinck* (4) it was decided that a report made by the president of a court of inquiry directed to be held by the Commander-in-Chief to inquire into the conduct of an officer in the army was a privileged communication, and that it was properly rejected as evidence at the trial of an action for libel, and that an office copy of it was also properly rejected. That decision also seems to me to involve the conclusion that, even if such a document could be put in, it would be absolutely privileged and no action could be founded upon it." In the present case I hold that the report being made by the defendant in his official capacity to the Prime Minister of Australia pursuant to the powers and duties to which I have referred, was a communication relating to State matters and therefore absolutely privileged.

As to the point arising upon the consequential publication

(1) 1 Ph. 50.
(2) [1895] 2 Q. B. 189.
(3) [1895] 2 Q. B. 193.
(4) 2 Brod. & B. 130.

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to various clerks and other persons, it is said in the defence that such alleged publication was made in the reasonable, usual, and ordinary course of business and is privileged. Taking these allegations in the defence to be well founded in fact, the decisions in *Boxsius* v. *Goblet Frères* (1) and *Edmondson* v. *Birch & Co.* (2) in my opinion cover the point and protect the consequential publication arising incidentally to the main matter of the publication of the report to the Prime Minister.

With regard to the alleged publication to members of the Federal Parliament, which I suppose refers to the publication of the report as a Parliamentary paper, the Parliamentary Papers Act, 1908, is pleaded and relied upon by the defendant. That statute is analogous to the British Parliamentary Papers Act, 1840, which was considered in *Mangena* v. *Lloyd.* (3) It is alleged, and I must take it to be the fact, that at some time on April 4, 1924, a resolution was passed by the Commonwealth Parliament that the report should be published. If and so far as publication pursuant to that resolution is complained of, I hold, by virtue of the Act itself, that the publication in Australia gives no cause of action in England, the principle of English law, as laid down in *Machado* v. *Fontes* (4), being, that an action will not lie in this country in respect of an act done outside the jurisdiction if the act is not wrongful in the country where it was done.

The next point is as to the publication in newspapers in Australia and in this country. Mr. Bevan, for the defendant, contended that where a resolution of the Federal Parliament has been passed authorizing the publication of a document, the effect of the Act of 1908 is to render previous publication of the same matter immune from action. I do not decide whether that contention is well founded or not; I leave open for decision at the trial the question whether any publication in Australia before the resolution of April 4 is protected by the Act of 1908. I also leave open any question

(1) [1894] 1 Q. B. 842.
(2) [1907] 1 K. B. 371.
(3) (1908) 98 L. T. 640; 99 L. T. 824.
(4) [1897] 2 Q. B. 231.

regarding the publication of extracts or summaries of the report which are alleged not to be accurate.

Then, as to publication in newspapers in this country: it is said to be part of the plaintiffs' case that there was publication of the report or parts of it in this country by sales from Australia House, the place where the defendant carries out his duties, of various issues of Australian papers, some of which were before the date of the resolution for the printing of the report. It is obviously a matter in dispute between the parties whether these publications, if they were made in London, were made by the defendant. There may also be a question in regard to those publications, how far, if at all, the Australian Act has any effect on the rights of the parties. These points depend partly on questions of fact, and I cannot now hold that absolute privilege applies to those publications.

I only desire to add this: it is often said that it is not a convenient way to dispose of matters such as this otherwise than at the trial. The order directing the points to be argued was not made by consent; it was made at the instance of the defendant; and Sir John Simon contended that the whole question was so much in doubt that it should be allowed to proceed to trial in the ordinary course. As to that, I have left open for trial those matters which, by reason of the obscurity either of the facts or of the law, in my judgment require to be tried; and I have only disposed of those matters which, as it seems to me, could have no further light thrown upon them by a trial. I have the satisfaction of knowing that if I am wrong my decision can be reviewed.

Order accordingly.

Solicitors for plaintiffs: *Smith & Hudson.*
Solicitors for defendant: *Coward, Chance & Co.*

J. S. H.

1925
June 18.

BETTS *v.* CLARE AND HEYWORTH, AND CLARE AND HEYWORTH, LIMITED.

Revenue—Income Tax—Trade Profits—Trade set up within three Years preceding Year of Assessment—Average of Profits—Computation—Income Tax Act, 1918 (8 *& 9 Geo.* 5, c. 40), *Sch. D, Cases I. and II., rr.* 1 (2.), 9.

On March 1, 1919, a firm commenced a new business. On December 31, 1919, they made up the first account of the business for the ten months from March 1, 1919, to December 31, 1919, that account showing a profit for that period of 1000*l.* The firm sold the business as from January 1, 1920, to a company consisting of the same persons. The company made up an account of the business for the three months from January 1, 1920, to March 31, 1920, showing a profit for these three months of over 12,000*l.* The firm had duly paid income tax on the profits of its business for the year ending April 5, 1919. For the year ending April 5, 1920, an assessment to income tax under the Income Tax Act, 1918, Sch. D, was made on the firm and the company in certain sums. The firm and the company appealed to the Special Commissioners on the ground that the assessment ought to have been made on a smaller sum representing twelve-tenths of the profit shown on the first account only for the period of ten months, the sum being apportioned between the firm and the company according to their respective liabilities. It was contended on behalf of the Crown that the assessment should be made on a sum representing twelve-thirteenths of the profits shown by combining the two accounts for the respective periods of ten months and three months, that sum being apportioned between the firm and the company according to their respective liabilities. The Commissioners allowed the appeal:—

Held, that on the true construction of Sch. D, Cases I. and II., r. 1 (2.), the decision of the Commissioners was right.

Glensloy Steamship Co., Ld. v. *Lethem* (1914) 6 Tax Cas. 453; 51 Sc. L. R. 471 and *Burntisland Shipbuilding Co., Ld.* v. *Weldhen* (1923) 8 Tax Cas. 409; 60 Sc. L. R. 256 considered and principle applied.

CASE stated by Commissioners for the special purposes of the Income Tax Acts.

On March 1, 1919, Arthur Clare and Herbert Heyworth, then trading as Clare & Heyworth, hereinafter called the respondent firm, commenced a new business as textile manufacturers. On December 31, 1919, they made up the first account of their business for the period of ten months from March 1, 1919, to December 31, 1919, anticipating that the excess profits duty would be terminated on the latter date, and that an accurate account for the period ending on

that date would be required for the purposes of that tax. The profits for that period of ten months amounted, according to that account, the accuracy of which was not disputed, to 1000*l*. On February 12, 1920, the respondent firm entered into an agreement for the sale of the goodwill and assets of their business as from January 1, 1920, to Clare & Heyworth, Ld., hereinafter called the respondent company, which was incorporated on February 16, 1920, and adopted the agreement on March 1, 1920, the members of the respondent firm being the sole shareholders in the respondent company. The respondent company had since carried on the business. It decided to make up its accounts annually to March 31 in each year, and it accordingly made up an account for the period of three months from January 1, 1920, to March 31, 1920. That period was one of great prosperity in the textile industry, and the profits of the business for these three months amounted to 12,150*l*., as was not disputed. The respondent company had since made up its accounts for each year to March 31. It was admitted that apart from considerations of excess profits duty the first account would in all probability have been made up for the period of thirteen months from March 1, 1919, to March 31, 1920. On February 3, 1923, the respondent firm was assessed for the year 1918–19 to income tax in respect of profits of trade for the period March 1 to April 5, 1919, in the sum of 117*l*., being a due proportion of the profit of 1000*l*. shown by the first account for the period of ten months ending December 31, 1919, and it was not disputed that this assessment was correct.

On April 3, 1922, an assessment to income tax was made upon the respondent firm in the sum of 6250*l*., and on February 14, 1923, an additional assessment was made upon the respondent firm in the sum of 4358*l*., and on April 3, 1922, an assessment to income tax was made upon the respondent company in the sum of 6250*l*., all the said assessments being made for the year ending April 5, 1920, in respect of profits of trade, and all being made by the Additional Commissioners of Income Tax for the East Morley Division of the West Riding of Yorkshire.

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On February 11, 1924, the respondent firm and the respondent company appealed against the said assessments to the Special Commissioners.

It was contended on behalf of the respondent firm and the respondent company (1.) that the assessment to income tax for the year ending April 5, 1920, ought to be made on the sum of 1200*l.*, being twelve-tenths of the profit of 1000*l.* shown by the first account for the period of ten months ending December 31, 1919, and apportioned between the firm and the company under the Income Tax Act, 1918, Sch. D, Rules applicable to Cases I. and II., r. 9; (2.) that under r. 1 (2.) of these Rules (1) the computation for the year 1919–20 (the second year of assessment) should be made on the average of the profits from the date of the first setting up of the trade—namely, March 1, 1919; (3.) that profits arising in the year of assessment were incapable of

(1) The Income Tax Act, 1918, Sch. D, provides:—

1. Tax under this Schedule shall be charged in respect of—

(*a*) The annual profits or gains arising or accruing—. . . .

(ii.) to any person residing in the United Kingdom from any trade, profession, employment, or vocation. . . .

2. Tax under this Schedule shall be charged under the following Cases respectively; that is to say,—

Case I.—Tax in respect of any trade not contained in any other Schedule;

Case II.—Tax in respect of any profession, employment, or vocation not contained in any other Schedule; . . . .

. . . . . and subject to and in accordance with the rules applicable to the said Cases respectively.

RULES APPLICABLE TO SCHEDULE D.

Rule Applicable to Case I.

The tax shall extend to every trade carried on in the United Kingdom or elsewhere, other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Sch. A, and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment.

Rules Applicable to Cases I. and II.

1.—(1.) The tax shall be charged without any other deduction than is by this Act allowed.

(2.) Where the trade, profession, employment, or vocation has been set up and commenced within the said period of three years, the computation shall be made on the average of the profits or gains for one year from the period of the first setting up of the same, and where it has been set up and commenced within the year of assessment, the computation shall be made according to the rules applicable to Case VI.

being made the subject of the retrospective method of computation applicable to profits of trade under the relevant provisions of the Act, and that the method of assessment adopted in this case involved a departure from that method which was not warranted; (4.) that the proper method of assessment was to expand the profits for the ten months to December 31, 1919, to terms of one year; (5.) that the fact that the making of assessments was delayed, or that assessments were not made until after preparation of an account of profits arising in the year of assessment did not justify the bringing into computation of those profits for assessment under Sch. D, Case I. (1); and (6.) that the assessments appealed against should be reduced to 1200*l.*

It was contended on behalf of the Crown that the assessment for the year ending April 5, 1920, ought to be made in the sum of 12,138*l.*, being twelve-thirteenths of the profits of 13,150*l.*, arrived at by combining the two accounts for the periods of ten months from March 1 to December 31, 1919, and three months from January 1 to March 31, 1920. It was agreed that the assessment ought to be apportioned between the respondent firm and the respondent company.

The Commissioners allowed the claim that the liability to tax for the year ending April 5, 1920, should be based on the account for the ten months to December 31, 1919, without regard to the account for the three months to March 31, 1920, and they accordingly reduced the assessment to 1200*l.*

Sir D. Hogg A.-G. and *R. P. Hills* for the Crown.
Cyril King for the respondents.

ROWLATT J. In this case the facts are as follow. A firm commenced a business on March 1, 1919. When April 6, 1919, arrived, which was the beginning of the financial year, they, naturally enough, had not made up any accounts to that date. When December 31, 1919, came, they made up an account to that date which showed a profit of 1000*l.* for ten months—100*l.* a month, roughly speaking. In the course of the early part of 1920 the firm transferred their business to

(1) See note (1) ante, p. 404.

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a company, and turned it, as the phrase is, into a limited company, practically the same persons being interested in the firm and the company. The result of that transaction was so salutary to the business that between January 1 and March 31, 1920, the profits increased forty times, amounting to over 12,000*l.* For the broken end of the financial year 1918–19 the firm was assessed to income tax by taking the proportion of 1000*l.* for the ten months which could be attributed to the first month of their trading. Now comes the assessment of the firm and the company for the next year 1919–20.

The issue between the parties is this: The Crown, who is the appellant, says that for the purpose of ascertaining the year's profits of the business the profits for the three months from January 1 to March 31, 1920, as well as the profits for the preceding ten months, must be brought into account. The respondents say that the profits for the three months must not be brought into account. Nothing turns upon the change from the firm to the company. It is necessary to find what was the year's profit of the business, but how it is divided does not matter. Both parties are agreed about that.

The question turns upon the construction of the Income Tax Act, 1918, Sch. D, Rules applicable to Cases I. and II., r. 1, sub-r. 2, which provides that, when the trade, profession, employment, or vocation has been set up and commenced within the period of three years preceding the year of assessment, but not within the year of assessment, the computation shall be made on the average of the profits or gains for one year from the first setting up of the same. When an average has to be formed to give a figure expressing relation of quantity to time two periods are required. First, the period must be had for which the average quantity is to be taken, that is to say, in the case of profits, are they to be the average profits for a month, for a week, for a day, for an hour, or for what other period? The period selected is that for which the average profits are to be taken. But another period also must be had—namely, the period over which the average is to be calculated. Is it to be over a year,

over ten years, over a century, or over what other period? In the sub-rule the phrase used is "the average of the profits or gains for one year from the period of the first setting up of the same." I think that means that the period for which the average profits are to be taken is to be a year, and that the period over which the average of the profits is to be calculated is to be a period which is to run from the first setting up of the business, and is to end on a date which is not specified in the rule.

The point between the parties is whether that period over which the average is to be calculated is to end at the beginning of the year of assessment or is to run into the year of assessment. If it runs into the year of assessment, does it run to the end of the year of assessment; or can it be determined at a point in the year of assessment at the election of the Crown or of the taxpayer; or does it run past the year of assessment, and end at some future date which is to be determined at somebody's election, subject to the expiry of the time when the assessment is made? It seems to me that the question has already been decided by the Scottish Courts. In the case of *Glensloy Steamship Co., Ld.* v. *Lethem* (1) the judgment of Lord Johnston, which was a dissenting judgment, expressed perfectly clearly the view that the terminus ad quem of the period over which the average profits are to be calculated is the beginning of the year of assessment, that is to say, that in a case such as this, the facts antecedent to the beginning of the year of assessment alone are to be looked at. In the subsequent case of the *Burntisland Shipbuilding Co., Ld.* v. *Weldhen* (2) that construction is, in my judgment, put beyond doubt. It is adopted in terms by Lord Cullen, and I think the Lord President says exactly the same thing, and Lord Skerrington concurs. As I think Lord Cullen puts the point more shortly, I will read what he says: "I think the natural reading of the statutory enactment in question is that where the period of trading antecedent to the year of assessment is shorter than three complete years, the materials for computing the artificial amount of profit

(1) 6 Tax Cas. 453; 51 Sc. L. R. 471. (2) 8 Tax Cas. 409; 60 Sc. L. R. 256.

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for the year of assessment consist of the results of the trading for such shorter antecedent period "—that means the period antecedent to the setting up of the business—" Thus, if that period had been $2\frac{1}{2}$ years, the cumulo profits made during that period fall to be divided by $2\frac{1}{2}$, similarly as would the profits of three complete years' antecedent trading be divided by 3." That, as the Lord President had previously pointed out, is the sense that must be given to the calculation of the average where there is not a large enough amount of profits to admit of the application of the word " average," as denoting an arithmetrical mean, with absolute strictness. That is what the judges of the Courts of Scotland say upon the point of construction, and that is the result at which they arrive.

It remains to deal shortly with the case of *Glensloy Steamship Co., Ld.* v. *Lethem* (1), which is explained in *Burntisland Shipbuilding Co., Ld.* v. *Weldhen.* (2) The *Glensloy* case (1) was like the present case in this respect, that no figure had been arrived at by balance sheet for the broken first year of assessment, and the authorities got at it, as they did in this case, by looking at the first published balance sheet, and that got the assessment for that first year out of the way. Then in making the assessment for the next year—the year in question—they looked at that balance sheet again, and the majority of the Court there held that they were entitled to do so. In the *Burntisland* case (2) the Lord President expressed his approval of the decision of the majority of the Court in the *Glensloy* case. (1) He said : " Great stress was laid in the judgment of the majority—very properly, as I venture to think—on the fact that there was no balance sheet, and therefore no profits ascertained, until after the commencement of the second year of assessment ; and, where that is the case, I desire to say nothing against the view that a first balance sheet, though struck within the second year of assessment, may—at any rate in circumstances such as were present in the *Glensloy* case (1)—be used evidentially in order to ascertain the ' average of the profits for one year from the period of the first setting up ' of the trade." I

(1) 6 Tax Cas. 453; 51 Sc. L. R. 471. (2) 8 Tax Cas. 409; 60 Sc. L. R. 256.

think he is plainly saying that what has to be ascertained is the average for one year of the profits from the setting up of the business to the beginning of the year of assessment, and that it is only as evidence of these profits and not as varying the principle of assessment that figures running into the second year of assessment could be looked at. That is what will be done in this case also if the first balance sheet which was rendered on December 31, 1919, be looked at for the purpose of ascertaining the average for one year of the profits from the setting up of the business to the beginning of the year of assessment. That balance sheet, which runs into the year of assessment but includes the period antecedent to the year of assessment, may be looked at as evidence of the profits in the included period between the setting up of the business and the beginning of the year of assessment. The Lord President says, however, that he does not agree in going beyond that. The contention on behalf of the Crown here is that the evidentiary proceedings should be further extended. It is said that in making the assessment the next balance sheet which was made out—a balance sheet which was sundered from the one before, and brings in the highly increased profits of a period which did not include the period antecedent to the year of assessment—may also be used as evidence of what in fact were profits antecedent to the year of assessment. It seems to me there is no warrant for that contention. It is not supported by the *Glensloy* case (1), and it is certainly not supported by that case according to the construction put upon it by the *Burntisland* case. (2)

Therefore, in my judgment, the Commissioners in this case were right, and the appeal must be dismissed with osts.

Appeal dismissed.

Solicitor for Crown: *The Solicitor of Inland Revenue.*

Solicitor for respondents: *F. B. Brook, for A. V. Hammond & Co., Bradford.*

(1) 6 Tax Cas. 453; 51 Sc. L. R. 471. (2) 8 Tax Cas. 409; 60 Sc. L. R. 256.

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June 9, 10;
July 31.

BENTON *v.* CAMPBELL, PARKER AND COMPANY, LIMITED.

Sale of Goods—Sale of specific Chattel by Auction—Auctioneer—Fact of Agency disclosed—Name of Principal not disclosed—Absence of Title in Principal—Liability of Auctioneer.

Where an agent purports to make a contract for a principal to buy goods, whether ascertained or not, or to sell unascertained goods, disclosing the fact that he is acting as agent, but not disclosing the name of his principal, he is personally liable to the purchaser if it afterwards appear that the principal had no right to sell, it being presumed that the purchaser would be unwilling to contract solely with an unknown man. But this presumption does not exist where a specific chattel is so sold, it being impossible to suppose that a purchaser would impose or an agent accept such a liability.

Hence where auctioneers, disclosing the fact of agency but not disclosing the name of their principals, sold a motor car by auction:—

Held, that they were not liable to the purchaser on its afterwards appearing that their principals had no right to sell.

Franklyn v. *Lamond* (1847) 4 C. B. 637; 16 L. J. (C. P.) 221 distinguished.

APPEAL from Birmingham County Court.

The following statement of facts is taken from the written judgment:—

The defendants, the appellants, are auctioneers and valuers at Birmingham, and carry on a large business in the sale of motor cars by public auction. The plaintiff, the respondent, is a dealer in motor cars, and was a frequent customer of the defendants. He received their catalogues regularly, and constantly attended their weekly sales. Early in 1923 a Ford car was delivered to the defendants by the Saxton Rubber Company with instructions to sell it by public auction. The defendants included the car in their catalogue for February 13, 1923, and meantime advanced 75*l.* to the Saxton Rubber Company against the proceeds of sale. The defendants' catalogue was in their usual form, and was headed "Birmingham Motor Mart. Important sale of motor cars, &c., to be sold by auction by Campbell, Parker & Co., Ld., auctioneers and valuers, from instructions received from various owners." No. 6 of the conditions of sale contained in the catalogue was as follows: "The

auctioneers will not hold themselves responsible for any action that may arise, acting solely as agents between buyer and seller, and for both equitably." The car was sold at the auction to the plaintiff, who took delivery from the defendants and paid the price to them. The defendants paid over the price to the Saxton Rubber Company, after deducting their loan and charges. The plaintiff resold the car to one Trean. It appeared later that the car was the property of one Bellingham, who had let it on hire-purchase to the Saxton Rubber Company on the terms that it should remain his property until all the instalments had been paid. Some of the instalments were still unpaid when the car was sold by auction. Eight or nine months after the auction Bellingham discovered his car in Trean's possession and recovered it. Trean sued the plaintiff, who settled the action for 40*l.* and 7*l.* 7*s.* costs. The plaintiff then brought the present action against the auctioneers claiming 47*l.* 7*s.* damages, and recovered judgment for that sum.

The defendants appealed.

Harold Eaden for the defendants. The defendants are not liable, inasmuch as they sold the car as agents acting for principals, a fact which was known to the plaintiff both from statements in the catalogue and from his knowledge of the nature of the defendants' business gained by long experience of it. In *Ex parte Hartop* (1) Lord Erskine C. said: "No rule of law is better ascertained, or stands upon a stronger foundation, than this; that, where an agent names his principal, the principal is responsible: not the agent: but, for the application of that rule, the agent must name his principal as the person to be responsible." In *Franklyn* v. *Lamond* (2) the auctioneers had not disclosed their principals at the time of the sale, and were held to be personally liable. But that case is distinguishable from the present case in that there was nothing in the conditions of sale to show that the

(1) (1806) 12 Ves. 349, 352. 2) 4 C. B. 637.

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auctioneers were acting for principals, or that they were not selling their own property. In *Wood* v. *Baxter* (1) it was held that where the principal is not disclosed the liability of the auctioneer depends upon the contract entered into by him, as shown by the conditions of sale and the surrounding circumstances, and that in that case there was no actual warranty of the principal's title to sell. The present is a much stronger case on the facts. Here the auctioneers intimated to the plaintiff that they were agents only, and did everything they could short of actually giving the name of their principals. In *Payne* v. *Elsden* (2) an auctioneer sold a piano seized under a distress warrant for rent; the warrant was invalid, and the true owner obtained possession of the piano. In an action by the purchaser against the auctioneer it was held that there was no implied warranty of title to the goods, and *Wood* v. *Baxter* (1) was adopted.

[SALTER J. In that case there was a half disclosure of the name of the principal.]

The contract with an auctioneer is not the same as that with an ordinary agent. It is enough if an auctioneer discloses the fact of his agency without disclosing the actual principal.

Colin Coley and *J. F. Eales* for the plaintiff. This case is covered by *Franklyn* v. *Lamond* (3), where auctioneers who did not disclose their principal at the time of the sale were held liable. The liability of an auctioneer rests in principle on this, that he has improperly dealt with goods with which he has no right to deal. This is not an action for fraud, but for breach of contract—namely, breach of covenant of title as principals, for, acting as agents for undisclosed principals, the defendants must be treated as if they were principals, in which case there is an implied covenant of title.

[SALTER J. The question is whether the contract between the highest bidder and the auctioneer is a contract to make delivery or one to pass the property.]

(1) (1883) 49 L. T. 45.
(2) (1900) 17 Times L. R. 161.
(3) 4 C. B. 637; 16 L. J. (C. P.) 221.

It is submitted that the latter is the contract. In *Franklyn* v. *Lamond* Coltman J. said (1): "The auctioneer takes upon himself the liability of a vendor, and must make a title to the vendee." In *Wood* v. *Baxter* (2) Williams J. quoted with approval the following passage from Story on Agency, 9th ed., s. 267, p. 321: "Where a contract is made with an auctioneer for the purchase of goods at a public sale, and no disclosure is made of the principal on whose behalf the commodity is sold, the auctioneer will be liable to the purchaser to complete the contract, although from the nature of public sales it is plain that he acts as agent only." It is true that in *Wood* v. *Baxter* (2) the contract was a contract to deliver.

[*Hanson* v. *Roberdeau* (3) and s. 12 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), were also referred to.]

Cur. adv. vult.

1925. July 31. SALTER J. read the following judgment: In this case the question is whether an auctioneer who sells a chattel by auction, disclosing the fact of agency but not naming his principal, and pays over the proceeds of sale to the principal, is liable in damages to the buyer if it afterwards appears that the principal had no right to sell. [His Lordship read the facts set out above and continued:] The plaintiff recovered judgment. That judgment is right, first, if the defendants are liable to the plaintiff as sellers on the contract for sale, or, secondly, if they are agents warranting their principal's right to sell. The plaintiff relied on the first of these causes of action and succeeded on it, but both must be considered.

An attempt was made to show that the defendants were dealers and that they were selling their own property. The learned county court judge clearly found that they were in fact agents, selling the property of another. I think that it is equally clear that he found, or assumed, that they

(1) 16 L. J. (C. P.) 224. (2) 49 L. T. 45.
(3) (1792) 1 Peake, 163.

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were known by the plaintiff to be agents. If the fact of agency was not disclosed the plaintiff's claim was undefended. But I think it is clear from the whole judgment and from the cases cited that the learned judge treated the case as one of disclosed agency and undisclosed principal. I think there was no evidence on which any other conclusion could have been reached. Besides the catalogue and conditions there was the evidence of the plaintiff, who said that, since the sale, he had discovered that the defendants were dealers, but that, at the time of the sale, he thought that they were agents only. The case seems to have been fought in the county court, and was certainly argued before us, as a case in which agency was disclosed, and I deal with it on that footing.

Where an agent purports to make a contract for a principal, disclosing the fact that he is acting as an agent, but not naming his principal, the rule is that, unless a contrary intention appears, he makes himself personally liable on the authorized contract. It is presumed that the other party is unwilling to contract solely with an unknown man. He is willing to contract with an unknown man, and does so, but only if the agent will make himself personally liable, if called on, to perform the contract which he arranges for his principal. The agent is presumed to agree. The liability of the agent is not joint, nor is it contingent on default by the principal. Two contracts are made in identical terms, one with the principal and the other with the agent, and the opposite party, unless prevented by some election, can enforce either, but not both.

The first question here is whether this general rule applies in this case, or the circumstances are such as to rebut the presumption. Where the agency is to buy goods, whether ascertained or not, so that the liability imposed on the principal by the contract is a liability to accept and pay, there is nothing in the circumstances inconsistent with a presumption that the seller requires that the agent shall make himself personally liable to take and pay for the goods in accordance with the contract of sale, if called on, or with

a presumption that the agent agrees to do so. So, again, if the agency is to sell unascertained goods, there is nothing inconsistent with a presumption that the buyer stipulates, and the agent agrees, that the agent will himself deliver goods in accordance with the contract of sale, if called on. If he has not the necessary goods he can procure them and make delivery. But where the agency, as in this case, is an agency for the sale of a specific chattel, which the buyer knows is not the property of the agent, it seems to me impossible to presume that the buyer, who contracts to buy that chattel from the principal, would stipulate that the agent, if called on, shall himself sell the chattel to the buyer and shall himself warrant his own title to a thing which the buyer knows is not his. It is impossible to presume that the agent would agree to undertake such a liability. The only way in which he could discharge it would be by acquiring the chattel from his principal, a thing he has no right to demand and a thing inconsistent with the contract he has been instructed to make, by which the principal sells that chattel to the buyer. For this reason I think that the presumption above mentioned is rebutted in the case of a sale of a specific chattel by an unknown agent for an undisclosed principal.

This applies to an auctioneer as to any other selling agent. The auctioneer has a special property in the chattel delivered to him for sale, he has a lien on it and on the price of it, he has rights against the buyer, and liabilities to him, which do not accrue to other selling agents. These rights and liabilities do not arise from the contract of sale, which binds only the buyer and the principal. They arise from the contract which the auctioneer makes on his own account with the buyer. Every agent to contract, when he makes the authorized contract between his principal and the other party, makes also a contract on his own account with the other party; he warrants his authority. If he is an agent for sale he also warrants that he knows of no defect in his principal's title. If he is an auctioneer to whom a chattel has been delivered for sale he gives both these warranties,

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he undertakes to give possession against the price paid into his hands, and he undertakes that such possession will not be disturbed by his principal or himself. There may, of course, be other terms in this contract arising on the facts of the case. The warranties are implied terms, the duty to deliver and the right to receive the price are usually expressed in the conditions of sale. But whatever its terms may be, the contract is entirely independent of the contract of sale. To that contract the auctioneer who sells a specific chattel as an agent is, in my opinion, no party. He has no right to enforce it and is not bound by it. It is true that an auctioneer can sue the buyer for the price in his own name, and as for goods sold and delivered, but the authorities on this point, so far from showing that he can enforce the contract of sale, seem to me to show that he cannot. He can sue for the price where he has sold for a disclosed principal; *Williams* v. *Millington*. (1) In such a case the contract of sale, unless a contrary intention is expressed, is made with the principal only. It is clear, therefore, that the auctioneer does not sue for the price by virtue of the contract of sale. Again, so long as the auctioneer's lien is unsatisfied the buyer cannot, in the absence of special circumstances, set off a debt due to himself from the principal against the auctioneer's claim for the price: *Robinson* v. *Rutter* (2); but, if the lien has been satisfied the buyer can rely on such set-off: *Holmes* v. *Tutton*. (3) If the auctioneer could enforce the contract of sale, he could sue for the price so long as it remained unpaid, no set off of a debt due to the defendant from a third party could be set up, and no question of lien could arise. The auctioneer sues for the price by virtue of his special property and his lien, and also, in most cases, by virtue of his contract with the buyer, that the price shall be paid into his hands, and not by virtue of the contract of sale. He is not the seller, nor had he undertaken to discharge the liabilities of a seller except so far as those

(1) (1788) 1 H. Bl. 81. (2) (1855) 4 E. & B. 954.
(3) (1855) 5 E. & B. 65, 82.

liabilities may be included in his own contract with the buyer. Therefore, he does not warrant that the buyer will get a good title, unless such warranty is expressly or impliedly included in his own contract with the buyer. *Wood* v. *Baxter* (1) supports this view, and *Hanson* v. *Roberdeau* (2); *Franklyn* v. *Lamond* (3); and *Woolfe* v. *Horne* (4) are not, I think, inconsistent with it, when those cases are examined. In *Hanson* v. *Roberdeau* (2) a post-obit bond had been sold by auction, the auctioneer being a known agent for an unknown principal. The bond not being assigned within the time agreed on by the conditions of sale, the buyer recovered damages from the auctioneer for breach of his contract to deliver. Lord Kenyon said: "Though where an auctioneer names his principal, it is not proper that he should be liable to an action, yet it is a very different case when the auctioneer sells the commodity without saying on whose behalf he sells it; in such a case the purchaser is entitled to look to him personally for the completion of the contract." The passage in Story on Agency, 9th ed., para. 267, p. 321, is framed on this judgment. I think the meaning is that the buyer is entitled to look to the auctioneer to complete the contract by making delivery against the price in accordance with the conditions of sale. In *Franklyn* v. *Lamond* (3) the plaintiff had bought at auction 300 shares in a company, and paid the price to the auctioneers. The constitution of the company required a transfer by deed. The buyer applied to the auctioneers for a transfer. They informed him that they were agents and disclosed their principal, but never procured a transfer. The buyer recovered damages from the auctioneers for non-delivery. The declaration does not allege any contract of sale between the plaintiff and the defendants. It alleges that the defendants put up the shares for auction, that the plaintiff was declared the highest bidder, and that the defendants then agreed with the plaintiff to deliver against the price, and failed to do so. It is not clear that the case was treated

(1) 49 L. T. 45.
(2) 1 Peake, 163.
(3) 4 C. B. 637.
(4) (1877) 2 Q. B. D. 355.

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as one in which the fact of agency was disclosed. Wilde C.J. said (1): "This is the simple case of parties who have sold as principals, turning round afterwards and saying that they were merely agents in the transaction." Coltman J. said (2): "The defendants underlie the ordinary responsibility of a seller. Not having disclosed their principal at the time of the sale, it must be assumed that they contracted to make a good title to the things sold." The plaintiff had not alleged such a contract; he sued on a contract, made after the fall of the hammer, to give possession against the price. The defendants certainly underlay some of the responsibilities of a seller. They were bound to deliver. But if this sentence means that an auctioneer who sells a specific chattel as a known agent for an unknown principal is deemed in law to undertake to make a title himself, or to warrant his principal's title, I think, with great deference, that it requires some qualification. Maule J. bases his judgment on the conditions of sale and on the duty therein imposed on the auctioneers to make delivery. He says (3): "Such being the state of the liabilities between the parties, it is quite clear that the defendants did agree to make the transfer of these shares. To enable them to enter into such a contract, it was not essential that they should be the registered proprietors. It was perfectly practicable for them to procure a transfer to be made, although they themselves might not be the actual owners of the shares." In both these cases the Courts were concerned with possession, not with title. I think there is nothing in either decision which implies that, if the auctioneers had procured transfers in accordance with the conditions of sale, and had paid over the purchase money, they could have been held liable to the buyer in damages if the title of the transferor had been at any time afterwards impeached. *Franklyn* v. *Lamond* (4) is further distinguishable, in that it was not a sale of a specific chattel. A transfer of any 300 shares in the company would

(1) 4 C. B. 644.
(2) Ibid. 646.
(3) 4 C. B. 647-8.
(4) Ibid. 637.

have performed the contract. In *Woolfe* v. *Horne* (1) there was a sale by auction of unclaimed property left in railway carriages on the Great Western Railway. It seems to me that the auctioneers disclosed their principal. They failed to deliver in accordance with the conditions, and were held liable in damages to the buyer. It is clear that the Court did not regard them as sellers or as undertaking all the liabilities of sellers. They were held bound to deliver on their own contract with the buyers. There is nothing to suggest that the Court considered them liable not only to deliver but also to make a good title or to warrant that their principal would do so. In *Wood* v. *Baxter* (2) there was a sale by auction of implements and growing crops on a certain farm. It is clear that the auctioneer's agency was disclosed; the principal's name was not disclosed and indeed was withheld when demanded. The conditions of sale stated that the sale was under a bill of sale, and provided that all implements bought were to be removed on the day after the sale "and the growing crops immediately after they arrive at maturity." The plaintiff purchased the wheat and straw then growing on certain land. When it was ripe he entered on the land under authority from the defendants and cut and threshed the crop and sold the wheat. The landlord then claimed that the straw must not be removed. It appeared that the tenant, the grantor of the bill of sale, had a right to remove the straw, but was bound to afterwards bring on the land an equivalent in manure. The buyer, without testing the validity of the landlord's claim, sued the auctioneers for the agreed value of the straw, alleging that they had sold it to him and failed to deliver. He was non-suited, and the non-suit was upheld in this Court. The result was right in any case. The defendants had given delivery in accordance with the conditions, and if they were bound to give, or warrant, a title, there was no evidence that they had failed to do so. The infirmity, if any, of the principal's title was never proved.

(1) 2 Q. B. D. 355. (2) 49 L. T. 45.

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Williams J. delivered a considered judgment, reviewing some of the authorities, in which he states the law, as follows (1): "There can be no doubt that an auctioneer, like any other agent selling goods on behalf of a principal, may, and constantly does, become himself a contracting party with the purchaser, and if he sells by auction without disclosing the name of his principal, his contract is very nearly that of an ordinary vendor, and he can sue and be sued as such upon the contract of sale. . . . . The further question then arises, what is the character and extent of the contract entered into by the auctioneer when he sells without disclosing the name of his principal? The answer to this is, that it depends upon the conditions of sale, upon what is said by the auctioneer at the time, upon the surrounding circumstances, and upon the nature of the subject matter of the sale. In the first place, it would certainly be going too far to say that an auctioneer, selling without disclosing the name of his principal, makes himself a contracting party in the same way and to the same extent that another agent acting for an undisclosed principal does. The auctioneer sells, not as an owner having a right to sell by virtue of his own right of property, but as an auctioneer empowered and entrusted by his employer to sell. If he is selling live stock or implements in the market place, or furniture in a room, the extent of his contract would ordinarily be to deliver the goods to the buyer; if he were selling shares in a joint stock company, it would be to procure a transfer to the purchaser; if he were selling timber stacked in a yard or loaded on board ship, or growing crops on a farm, it would be in each case to give such constructive delivery as according to the nature of the subject matter was practicable and usual. Upon making such delivery, his obligation would ordinarily be fulfilled. For example, upon such a contract there would not be necessarily implied any warranty of title in the goods, though he might, of course, like any one else, by his conduct or by declaration at the time of the sale, afford evidence of an actual warranty of title: see *Morley* v. *Attenborough* (2);

(1) 49 L. T. 46.

(2) (1849) 3 Ex. 500.

Eichholz v. *Bannister*. (1) An auctioneer who sells goods not as owner but as auctioneer only, though not naming his principal, does not, without more, warrant the title to the goods sold; he does no more than engage that he is in fact instructed and authorized by his principal to sell, as for example in the present case under the powers of a bill of sale; but he does not guarantee the validity of the bill of sale, nor the title of his employer to the goods. In fact, whenever the question is raised as to the extent of the contract that the auctioneer enters into when he sells goods by auction, this question must be determined, as in other cases, upon the evidence as to the conduct and declarations of the auctioneer, the nature of the subject matter of the sale, and the surrounding circumstances." After assuming that the auctioneers' principal had no right to sell the straw, the learned judge continued (2): "These being the facts, it seems to us that there was no evidence of any breach of contract by the defendants; the growing crop was in fact delivered to and taken possession of by the plaintiff and cut and harvested by him, and his difficulty arose not from the non-delivery of the goods by the defendants to him, but from the interference of a third person (who disputed the title of the bill of sale holder to sell the straw to be removed from the farm) who put forward a claim either well founded or ill founded to have the straw consumed on the farm." A. L. Smith J. clearly agreed with Williams J. that the auctioneers were not bound to give, or to warrant, a title. He says: "In my judgment the defendants in this case did give to the plaintiff all that they had contracted and were bound to give him, namely, the proper and requisite authority to enter upon the farm, and to cut and harvest and carry away the crop."

The only remaining question is whether the defendants as a matter of law, and by the mere fact of sale, warranted the Saxton Rubber Company's right to sell, and, if not, whether they gave such a warranty in fact. The first point

(1) (1864) 17 C. B. (N. S.) 708. (2) 49 L. T. 45, 48.

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is decided by *Wood* v. *Baxter* (1), and I can see no ground on which a warranty could be implied in law. The auctioneer cannot question his principal about his right to sell, and the buyer is well aware of the auctioneer's position. As regards warranty in fact, I do not think it was even suggested that the words "from instructions received from various owners" constituted a warranty of the title of every principal, and certainly there was no such finding by the learned county court judge.

In my opinion the appeal must be allowed and the judgment for the plaintiff be set aside and judgment entered for the defendants.

SWIFT J. I agree.

Appeal allowed.

Solicitors for appellants: *McKenna & Co., for Philip Cohen, Slater & Tompkins, Birmingham.*

Solicitors for respondent: *Nash, Field & Co., for Blewitt & Co., Birmingham.*

(1) 49 L. T. 45.

W. L. L. B.

A. C. HARPER AND COMPANY, LIMITED v. MACKECHNIE AND COMPANY.

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July 21.

[1924. A. 1563.]

Sale of Goods—Marine Insurance—C.i.f. Contract—Payment against Shipping Documents—Tender of Documents—Certificate of Insurance—Invalid Policy—Slip—Warranty.

Under a c.i.f. contract, when a certificate of insurance is tendered by the seller and accepted by the buyer in fulfilment of the contract and in lieu of a policy of insurance, there is an implied warranty by the seller that the assertions in the certificate are true, and that the seller will produce or procure the production of the policy referred to in the certificate. The seller in such a case is liable for a breach of this warranty, even if the certificate is in fact signed by insurance brokers and the brokers fail to effect an insurance which will continue valid throughout the transit of the goods.

ACTION in the Commercial List before Roche J.

By a contract made in January, 1922, the plaintiffs bought from the defendants 2½ tons of glacial acetic acid packed in demijohns, c.i.f. Singapore, cash against documents London. It was a term of the contract that the insurance should cover all risks, including breakage and leakage. The goods were shipped from Hamburg to Singapore on March 20, 1922.

On March 27 the plaintiffs paid for the goods against documents received from the defendants. The documents did not include an insurance policy, but included an undated certificate bearing a number. This certificate was signed by the brokers, Messrs. Allison & Co., and was in the following terms :—

Chesterfield House,
98, Great Tower St.,
E.C. 3.

Certificate of Insurance.
No. 3/1537.

"Sidney Allison & Co., Ld., Insurance Brokers.

This is to certify that on March 2, 1922, we have insured with Lloyd's and/or companies the following merchandise below described, shipped or to be shipped per str. and/or strs. and/or convs. appd. or h/c.

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From Hamburg to Singapore. This insurance covers the undernoted risks :—

Institute cargo clauses. F.P.A. Jettison and washing overboard and war. Leakage and Breakage. (In the event of accident whereby loss or damage may result in a claim under this policy the settlement will be much facilitated if immediate notice be given to the nearest Lloyd's agent.) For and on behalf of Sidney Allison & Co., Ld. T. R. Wright, Secretary. Glacial acetic acid in demijohns valued at 170*l*."

This certificate was accepted by the plaintiffs, and passed through the hands of the Hong-Kong and Shanghai Banking Corporation in London. The goods were damaged in the course of the voyage (as Roche J. in fact found) by breakage and leakage, and it was agreed by counsel at the trial that the loss sustained amounted to 123*l*. On July 28, 1922, the plaintiffs wrote to the defendants informing them of the damage and requesting them to collect the amount thereof, 123*l*., under the insurance policy, but the defendants failed to do so, and the plaintiffs brought this action, claiming 123*l*. for breach of contract.

In their statement of claim the plaintiffs alleged that by sending to them the certificate of insurance the defendants represented and warranted that they had effected a valid insurance on the goods, and impliedly undertook that they would furnish to the plaintiffs the policy incorporating the insurance contract mentioned in the certificate, and that such insurance contract was a valid and effective insurance, and would so continue during transit of the goods to Singapore, and that they, the defendants, would collect and pay to the plaintiffs the amount of any loss arising from perils covered by the contract of insurance ; and the plaintiffs alleged that they took up and paid for the documents relying on these representations and warranties. They further alleged that in breach of the contract the defendants had failed to effect or procure any such valid or effective insurance, and that such insurance was not valid or effective during the transit of the goods to Singapore.

By their defence (apart from general denials) the defendants

admitted their duty under the contract to furnish a valid and effective policy of insurance; they alleged that they had carried out this duty, but denied the representations and warranties alleged in the statement of claim.

In their reply the plaintiffs alleged that the insurance policy effected by the defendants was unenforceable against the insurers; that it was not effected until April 24, 1922, and that the defendants had not then disclosed to the insurers the name of the vessel and the fact that the vessel had sailed on March 20, 1922. They further alleged that the insurers were two companies incorporated in Switzerland, and that the policies issued by those companies were not such policies as were called for by the contract and certificate of insurance.

According to the evidence of one Thorpe, clerk to the insurance brokers who effected the policy of insurance on the goods, the insurance certificate of March 2, 1922, related to a policy to be issued by the Lancashire and Cheshire Insurance Corporation, and a slip had been received from that company on the same date covering the goods up to 170*l.*; but that slip was afterwards cancelled and no policy issued, the insurance brokers having transferred their business to other companies. On April 24, 1922, new slips were issued to the insurance brokers and a policy of insurance effected on the goods by the two Swiss companies. This policy was tendered by the defendants in fulfilment of their contract.

Le Quesne K.C. and *Anstice Brown* for the plaintiffs. When a certificate of insurance is tendered by a seller and accepted in a c.i.f. contract there is an implied warranty that it relates to an effective policy of insurance which will remain effective at all material times. There is no such policy in existence here. The original insurance with the Lancashire and Cheshire Insurance Corporation was cancelled. It was to a policy with that company that the certificate related, but if reliance is placed upon the policy issued by the Swiss companies in April we say that that policy is invalid by reason of the

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non-disclosure of a material fact—namely, that the vessel had already sailed. The state of the weather and the atmospheric conditions during the transit of the goods were all material to the insurance contract, and the underwriters can avoid payment on this ground.

Lastly, a policy taken out with a Swiss company is not in compliance with the contract, which requires a "Lloyd's or company's policy": *Malmberg* v. *Evans & Co.* (1)

C. W. Lilley for the defendants. The plaintiffs might have refused to accept the certificate of insurance and insisted on a policy of insurance; *Wilson, Holgate & Co.* v. *Belgium Grain and Produce Co.* (2); *Diamond Alkali Export Corporation* v. *Fl. Bourgeois.* (3) By accepting the certificate they have waived their rights to object to the policy effected by the sellers. A certificate of insurance contains a warranty by the broker that he has effected the insurance. In this it differs from a cover note, which contains no such warranty. A policy was duly effected, and the fact that the policy here tendered by the defendants is not the policy to which the certificate refers makes no difference.

The insurers, although companies incorporated in Switzerland, are subject, as regards the policies, to English law and usage.

[ROCHE J. I do not think that it will be necessary to consider that question for the purposes of my decision in the present case.]

The plaintiffs' proper remedy here is against the insurance brokers, who transferred the insurance and whose action may have rendered the policy invalid for non-disclosure. The plaintiffs accepted the certificate de bene esse, and cannot now be heard to complain. By doing so they gave the brokers the opportunity to transfer to another company, and must accept the policy tendered. The new insurance on April 24, 1922, was effected by the brokers on behalf of the plaintiffs themselves, to whom the property in the goods had passed. Lastly, it has not been shown

(1) (1924) 41 Times L. R. 38. (2) [1920] 2 K. B. 1.
(3) [1921] 3 K. B. 443.

that the policy effected is invalid, and therefore the plaintiffs have failed to prove damage, supposing that any breach of contract has been committed.

Le Quesne K.C. in reply.

ROCHE J. [after stating the facts]. It is common ground here, in view of the decisions in *Wilson, Holgate & Co.* v. *Belgian Grain and Produce Co.* (1); *Diamond Alkali Export Corporation* v. *Fl. Bourgeois* (2); and *Donald Scott & Co.* v. *Barclays Bank* (3), that the buyers would have been justified in refusing to accept this certificate of insurance or any similar certificate. The certificate was accepted, passed through a bank, and dealt with in the ordinary course, and it is clear from the evidence that the practice of accepting such certificates still survives in spite of the above decisions and the strict rights of the parties. The question is what is the effect of the acceptance of a certificate and what rights are acquired by the buyers? The goods in this case were damaged in the voyage by leakage and breakage, and this loss has not been recovered from the underwriters, because at the time when the insurance was effected the fact that the vessel had already sailed was not disclosed, and because that is a material fact which from the nature of the season or of the weather might have influenced the insurers in accepting the risk. It was argued for the defendants that, in the particular circumstances, the underwriters were given sufficient information or that they waived further disclosure. It is said that the brokers in asking the new underwriters to accept the transfer made it plain that the vessel had or might have sailed, and that they waived any other information. I am not satisfied that the underwriters knew more than that existing business was being transferred. I hold that there was no disclosure and no waiver. The underwriters refused to pay on the policy, and accordingly the plaintiffs bring this action.

It is argued for the plaintiffs that the defendants impliedly

(1) [1920] 2 K. B. 1. (2) [1921] 3 K. B. 443.
(3) [1923] 2 K. B. 1.

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undertook or warranted that the assertions in the certificate were true and that they would produce the policy. The defendants reply: (1.) that there was no such bargain, and that the plaintiffs accepted the contract with brokers, who undertook by their certificate to make a contract with any person holding it, and that the plaintiffs should look to the brokers for their remedy if they accepted the certificate and its terms were not performed; and (2) that, assuming a warranty by the defendants, that warranty was effectual at the date when the certificate was transferred, and that what the brokers did afterwards was the affair of the plaintiffs or of persons other than the defendants.

It is well established that the Court cannot imply more than is necessary to give business efficacy to a contract. But I think it is necessary to such efficacy to imply the terms which the plaintiffs here suggest. I hold that the defendants in handing over the certificate warranted by implication that the assertions contained in it were true, that the plaintiffs were not merely to rely on the brokers, but that the defendants undertook to produce or to procure the production of the policy referred to in the certificate. In the case of a c.i.f. contract where there is a chain of sellers, there is a contract between the broker and the original seller, and each successive seller, if he chooses to accept the certificate and to pass it on to a buyer, undertakes to make good what the certificate asserts. The ultimate remedy, if there is any irregularity shifts back until it reaches the original seller and the brokers themselves. If it were not so the position would be impossible. It is true that the policy mentioned in the certificate may cover goods greater in volume than those therein mentioned, but that does not affect the result.

It only remains to consider the argument that the plaintiffs have sustained no loss, because a valid policy was tendered in lieu of the policy referred to in the certificate. The answer is that on the facts as I find them the substituted policy was not a valid policy, which the plaintiffs were bound to accept, or which covered them against risk in the same way as the policy mentioned in the certificate would have covered them.

The point whether the substituted policy was a policy "with Lloyd's and/or companies" is still open to the plaintiffs, but I do not propose to decide it here.

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Judgment for plaintiffs.

Solicitor for plaintiffs: *E. G. Scott.*
Solicitors for defendants: *Blundell, Baker & Co.*

F. F. F.

In re BARONESS BATEMAN.

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March 26; *April* 6.

Revenue—Succession Duty—Estate Duty—Settlement—Purchase for partial Consideration—Bona fide Sale—Family Arrangement—Value of Property—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 3, *sub-ss.* 1, 2.

The Finance Act, 1894, s. 3, provides (sub-s. 1): "Estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes, ... where such purchase was made . . . . for full consideration in money or money's worth paid to the vendor . . . . for his own use or benefit"; and (sub-s. 2), "Where any such purchase was made . . . . for partial consideration in money or money's worth paid to the vendor . . . . for his own use or benefit, ... the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty."

By settlements made in 1906 and 1911, a lady, in consideration of 5100*l.* which was paid over to her by her son, conveyed certain furniture upon trust for herself for life with remainder to her said son absolutely. At her death in 1918 the furniture was sold for 45,000*l.*, and the Crown then claimed succession duty and estate duty upon the difference between the two sums from the trustee of the settlements:—

Held, that the transaction was a bona fide sale between mother and son, and that no succession duty was payable.

Held, as to the claim for estate duty, that there had been a "purchase for partial consideration" within s. 3, sub-s. 2, of the Finance Act, 1894, that the consideration paid represented four-fifths of the value of the property at the date of such purchase, and that estate duty was therefore payable only upon one-fifth of the value as at the date of the death of the tenant for life.

"Partial consideration" in s. 3, sub-s. 2, means something less than the full and fair value as between buyer and seller.

In re Lombard [1904] 2 I. R. 621 not followed on this point.

SUMMONS under the Crown Suits Act, 1865, s. 56.

By deed of settlement dated January 26, 1906, the

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Rt. Hon. Agnes Burrell, Baroness Bateman, settled certain furniture upon herself for life with remainder upon her death to her son, Hon. Charles Hanbury, absolutely, the consideration for the settlement being 5100*l.* paid by her son to her.

The settlement contained a covenant by Baroness Bateman to keep the property insured, and it was to remain in her possession at her risk.

The circumstances under which the settlement was executed were that the Lady Bateman was desirous of paying a debt of 9000*l.*, and in order to assist her to do so the Hon. Charles Hanbury agreed to buy from her the furniture in question, and further agreed that she should have the use of it during her life.

By a further deed of settlement dated January 16, 1911, Lady Bateman and her said son assigned the same furniture to the respondent, Charles Wreford Brown, upon trust for sale and investment and to hold the proceeds and the investments thereof upon trust to pay the income to Lady Bateman for life and after her death for her said son absolutely, and in the meantime and until sale thereof to permit Lady Bateman to have the use and enjoyment thereof.

On March 13, 1918, Lady Bateman died, and shortly afterwards the furniture comprised in the settlements was sold for 45,000*l.*

On May 28, 1919, the Hon. Charles Hanbury executed a deed of release and indemnity discharging the respondents from all the trust property and from all claims and demands in connection therewith. On October 27, 1921, the Hon. Charles Hanbury was adjudicated bankrupt. In December, 1923, assessments for estate duty and succession duty were received by the respondent from the Commissioners of Inland Revenue in respect of 45,000*l.*, the proceeds of sale of the furniture, a deduction of 5100*l.* being allowed in respect of the consideration for the settlement given by the Hon. Charles Hanbury.

On March 24, 1924, the present summons was issued in the King's Remembrancer's Department under the Crown

Suits Act, 1865 (28 & 29 Vict. c. 104), praying that the respondent be ordered to pay the duties assessed and calling upon him in default of payment to show cause.

The respondent by affidavits filed in answer to the summons deposed to the above facts and contended that the settlement of January 26, 1906, was a sale by Lady Bateman of the furniture for the full consideration in money or money's worth paid to her for her own use and benefit within s. 2, sub-s. 1, of the Finance Act, 1894, and that the allowance of 5100*l.* made by the Commissioners under s. 3, sub-s. 2, of that Act was not sufficient.

He also said that the price realized for the furniture in 1920 was abnormally high, and bore no relation to its value in 1906 when the settlement was made.

According to affidavits filed on behalf of the Commissioners the respondent as trustee of the settlement was personally accountable for the duties claimed, by virtue of s. 44 of the Succession Act, 1853, and the Finance Act, 1894, s. 8, sub-s. 4. The amounts of the assessments with interest to August 1, 1924, were, for estate duty 3891*l.* and for succession duty 447*l.*

W. A. Greene K.C. and *Needham* (*J. Scrimgeour* with them) for the respondent. Full consideration was given in 1906 by the son for the reversion which he purchased, and neither estate duty nor succession duty became payable on the death of the life tenant. Even if the full market value was not given for the reversion, still succession duty will not become payable on the death of the life tenant, as it was a conveyance by way of a bona fide sale and therefore is excluded from the operation of the Succession Duty Act, 1853, ss. 2 and 7. In *Attorney-General* v. *Johnson* (1) Phillimore J. expressed the view that a sale is not necessarily not bona fide because it is at an under value, or even at a considerable under value. In that case he held that there was a bona fide purchase of an annuity at an under value, and that therefore succession duty was not payable. The Court of Appeal, however, held (2)

(1) [1902] 1 K. B. 416, 427. (2) [1903] 1 K. B. 617.

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that the transaction was a gift and not a bona fide purchase of an annuity, and that therefore succession duty was payable, but they did not dissent from Phillimore J.'s expression of opinion. It is clear that the transaction in the present case was not a gift, and it is admitted by the Crown to be a bona fide sale.

With regard to estate duty, s. 3, sub-s. 1, of the Finance Act, 1894, provides that "estate duty shall not be payable in respect of property passing on the death of the deceased by reason only of a bona fide purchase from the person under whose disposition the property passes . . . . where such purchase was made . . . . for full consideration in money or money's worth paid to the vendor or grantor for his own use or benefit." . . . . If therefore full consideration was given for this reversion, estate duty is not payable. But if full consideration was not given for it, then s. 3, sub-s. 2, becomes applicable. That section provides that "where any such purchase was made . . . . for partial consideration in money or money's worth paid to the vendor or grantor for his own use or benefit . . . . the value of the consideration shall be allowed as a deduction from the value of the property for the purpose of estate duty." The contention of the Crown that estate duty must be paid on the value of the reversion at the death of the life tenant less the amount paid as consideration therefor in 1906 is not correct. If one value has to be deducted from another value, the two values must be taken as at the same date, otherwise they are not comparable.

If therefore the consideration paid for the reversion in 1906 was say five-eighths of its market value at that time then estate duty ought to be paid on three-eighths of the value of the reversion at the death of the life tenant and not on the value at the death of the life tenant less the amount paid as consideration. The section says that "the value of the consideration shall be allowed as a deduction," which implies that a calculation has to be made. If it had been intended that the sum actually paid as consideration should be deducted from the value of the property at the date of the death it would have been so stated in the section, and the

words "value of the consideration" would not have been used. Those words mean that the proportionate value of the consideration shall be deducted. Therefore either the value of the property for the purpose of estate duty must be taken as at the date of the purchase, or if the value of the property is taken as at the date of the death of the life tenant, then such a meaning must be given to the words "value of the consideration" as that the amount to be allowed as a deduction shall bear the same proportion to the value of the property at the date of the death of the life tenant as the sum paid as consideration bore to the market value of the reversion at the date of the purchase. The note (7.) in Hanson's Death Duties, 7th ed., p. 97, to the contrary effect is wrong.

Spens K.C. and *Beebee* for the Commissioners of Inland Revenue. As regards estate duty the transaction in the present case cannot be fairly described as a bona fide sale within the Finance Act, 1894, s. 3, sub-s. 1. The case is analogous to *Attorney-General* v. *Hawkins* (1), being in reality a matter of family arrangement. The whole circumstances must be looked at in order to decide whether this settlement was an ordinary commercial transaction or a family arrangement, and there is then only one conclusion: *Brown* v. *Attorney-General.* (2)

The "full consideration" referred to in the Finance Act, 1894, s. 3, sub-s. 1, means the full consideration at the date of purchase. The "value of the property" in sub-s. 2 refers to the value at the death of the life tenant when the property becomes liable to duty, and the note in Hanson's Death Duties, 7th ed., p. 97, to this effect is right. Where partial consideration has been given, as here, the amount so paid is to be deducted from the full value at the death of the life tenant, and the balance is the amount subject to duty. This was the construction adopted in *In re Lombard* (3), where partial consideration in sub-s. 2 was held to relate to a contract

(1) [1901] 1 K. B. 285. (2) (1899) 79 L. T. 572.
(3) [1904] 2 I. R. 621.

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where the consideration was in part money and in part marriage.

There is no machinery in the Act for a valuation of the property at the date of the settlement, and such a valuation was never intended by the Legislature. The reason why the sub-section does not speak of the "amount of the consideration" instead of its "value" is because the consideration might be otherwise than in cash, and therefore the "value of the consideration" is the proper phrase in speaking of the allowance by way of deduction. The proportional method of valuation suggested by the defendant cannot be supported. As regards succession duty, there is no such distinction as exists in the case of estate duty between full consideration and partial consideration. If there be a bona fide sale, then succession duty is not payable. The amount of consideration is therefore only material in deciding whether there be a bona fide sale or not. If the Court should hold the consideration to be illusory then there is no bona fide sale. If the consideration be insufficient to support a bona fide sale then for the purposes of succession duty a deduction may be made in respect of the amount actually paid: *Brown* v. *Attorney-General.* (1)

Greene K.C. in reply. As regards succession duty, if there be a bona fide sale no duty is payable, even if the consideration given was less than the full consideration. This is a pure question of fact.

[ROWLATT J. Apart from the inadequacy of the consideration does the fact that the transaction was between mother and son prevent its being a sale?]

No, the same transaction may be both a sale and a family arrangement. An instance of that was *Lethbridge* v. *Attorney-General* (2), where the facts were very similar to those in the present case. The burden of proving that the transaction was not a sale is upon the Crown. The relationship of the parties does not affect the question. This case is not concluded by *In re Lombard.* (3) There the subject was held

(1) 79 L. T. 572. (2) [1907] A. C. 19.
(3) [1904] 2 I. R. 621.

to be entitled to a certain deduction, and it does not follow that he might not have claimed more. The contention of the Crown would lead to inequitable results, and if the words of the statute will bear the more reasonable construction which we suggest that construction should be given them. Here either full consideration was given at the time of the purchase, or we are at least entitled to a proportionate deduction.

ROWLATT J. This case raises a question as to the amount of estate duty, and it arises upon a summons to show cause under the Crown Suits Act, 1865. It is not conceded by the Crown that this method of challenging the amount of duty is open to the subject, but on this occasion they have waived any point of procedure, and I am free to deal with the matter apart from technical difficulties of that kind. The facts may be shortly stated. [His Lordship stated the facts of the case and continued:] In these circumstances I have first to decide whether there was a purchase of the furniture subject to a life interest. If so, and if the purchase was bona fide for money or money's worth, either in full or partially, s. 3, sub-s. 1 or sub-s. 2 of the Finance Act, 1904, applies, and no succession duty is payable at all.

The transaction here was induced of course by family considerations, but that does not conclude the matter. My attention has been drawn to observations in *Lethbridge* v. *Attorney-General* (1) in the House of Lords, where it is pointed out that there might be a family arrangement co-existent with a purchase. The question is whether the object of the transaction was really on the one side to get money for goods by disposing of the goods in the future, and on the other side to pay money and obtain goods. In *Brown* v. *Attorney-General* (2) a father entered into a partnership deed with his son, one of the provisions being that on his death the son should take over the father's share in consideration of a payment of 10,000*l.* to the estate. There the motive and intention were clearly not to turn something into money

(1) [1907] A. C. 24. (2) 79 L. T. 572.

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either in the present or in the future, but to provide for the disposal of the business after death, and to prevent the business going to the eldest son without his making some corresponding contribution to the estate. It was held that that could not fairly be described as a sale and purchase. In the present case the mother was in want of money, and she obtained it by a simple sale of her furniture subject to her life interest. The sum paid, whether it was the full amount which would have been obtained for it or not, was certainly not so inadequate as to be an unreality. I think therefore that this was a bona fide sale and purchase by the son, and that no succession duty is payable.

The next question is whether the matter comes within the Finance Act, s. 3, sub-s. 2. In *In re Lombard* (1) it was held that "partial" consideration as used in these sub-sections does not necessarily mean "consideration" in money, but applies to cases in which the consideration varies in kind and includes such considerations as marriage. It seems to me that having regard to *Brown* v. *Attorney-General* (2) and other cases to which I have been referred it is difficult to follow *Lombard's* case. (1) I cannot treat a marriage settlement as consideration for purchase within the meaning of the Finance Act, s. 3. "Partial" consideration is opposed to "full" consideration in money or money's worth, which means that the full fair price has been paid and that nothing is left over for gift or natural love and affection or any other consideration. In other words it is the full and fair value as between buyer and seller, while partial consideration means something less than that. That brings me to the question of the figures in the present case. The sum of 5100*l.* was paid for the furniture in 1906, subject to the mother's life interest. In 1918 it was sold for 45,000*l.* to a purchaser who bought it together with the house. It had then been exposed to wear and tear for twelve years and its value had no doubt diminished. In 1910 there had been a valuation of 34,000*l.* for replacement value for insurance, and that is said to

(1) [1904] 2 I. R. 621. (2) 79 L. T. 572.

correspond to 11,000*l.* as the value at auction in 1910. [His Lordship discussed the expert evidence as to value and continued:] Looking at the figures I cannot think that 5100*l.* was really the full value of the furniture at the time of the transaction, and I shall take it that that sum represented 80 per cent. of the full value. That brings me to the last question. The Crown have allowed the sum that was paid by the son at the date of the settlement against 45,000*l.* as being the value of the consideration under s. 3, sub-s. 2, of the Act, and if that is right the matter is concluded. I do not think that this method is right, because the effect is to compare two entirely different things, which would lead to this absurdity, that if I find that 5100*l.* was the full value, nothing would be payable, while if I find that it is only 99 per cent. of the value, 5100*l.* will be set off against 45,000*l.* Am I then to say that the amount to be deducted is to be arrived at by a process of interest or discount? I think not. The only alternative is that for which the respondent contends, which I may describe as the proportional method. The object of s. 3, sub-s. 2, is to see how much of this property is passing by way of bounty and how much by way of purchase. That can only be done by ascertaining what proportion of the property was the subject of purchase and what proportion is represented by gift. Under that interpretation the words "the value of the consideration" mean "the value which corresponds to the consideration," that is to say, the value in the article partially bought which was bought by the consideration. In other words, this proportion can be allowed as a deduction from the value of the property. It is necessary to find the piece of property which is being taxed, and if it passes partially by reason of purchase for consideration in money or money's worth, then such part of the value as corresponds to the consideration must be deducted from the value of the whole property. I think that the consideration represented four-fifths of the value at the time of purchase, and it follows that estate duty is payable in respect of one-fifth of the value of the property.

[His Lordship then made a declaration that no succession

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duty was payable, and that for purposes of estate duty a sum equal to 80 per cent. of the value of the property should be allowed as a deduction therefrom.]

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Solicitors for the respondent: *Devonshire, Wreford Brown & Co.*

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[IN THE COURT OF APPEAL.]

KENNEDY *v.* HORDEN COLLIERIES, LIMITED.

BAMFORD *v.* CHARLAW AND SACRISTON COLLIERIES, LIMITED.

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Workmen's Compensation—Claim by Dependant—Partial Dependency—Principles for ascertaining Standard of Living—"Ordinary necessaries of life for persons in his class and position"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. 1., para.* 1 (*a*) (*ii.*)—*Workmen's Compensation Act,* 1923 (13 & 14 *Geo.* 5, *c.* 42), *s.* 22.

By the Workmen's Compensation Act, 1923, s. 22: "For the purposes of the principal Act, a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position":—

Held, that in applying the section to a case of partial dependency under para. 1 (*a*) (ii.) of Sch. I. to the Act of 1906, the following principles were applicable:—

(1.) The Court must have regard to the standard of living that obtains among persons of the same class and position as the person claiming to be a dependant.

(2.) As a general rule where the Court finds that the applicant, as the head of the family, has adopted a certain scale of expenditure, it ought, prima facie, to regard that scale as fixing the standard of living of persons in the same class and position as the applicant, unless that scale is on the face of it grossly excessive or there is evidence to show that it is in fact higher than the standard at which the persons in that class generally aim.

(3.) There is no common standard for all persons engaged in the same employment. The scale of expenditure must in the case of any particular family depend on a variety of circumstances, such as the number of the children, their sexes and ages, and whether any and if

so how many of them are working and receiving wages and their amount.

(4.) The word "necessaries" in s. 22 ought to receive the same meaning as has been attached to it in other connections, as, for example, in the case of contracts by infants, and must be held to include all such things as are reasonably necessary to maintain the particular person in his state, station and degree.

(5.) Where the whole of the family expenditure, including the contribution to it by the deceased, is upon necessaries, dependency is established within the terms of the section.

The exposition of the law in the county court approved.

APPEALS from three awards of the judge of the Durham County Court sitting at West Hartlepool, Durham and Consett respectively as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The facts of the three cases are fully stated in the considered judgment of His Honour Judge Moore, which was delivered by him at Durham on January 15, 1925, as follows :—

The first of the three cases in which I am about to give my decision was heard before me at West Hartlepool, the second was heard before me in Durham, and the third at Consett. All three cases however involved the same question of principle, and therefore, for the convenience of every one, it was arranged that I should deliver judgment in all of them at the same time at this Court in Durham. In each case the applicant was a father who claimed compensation under the Workmen's Compensation Acts for the death of his son, on the ground that he was partially dependent on his son's earnings, and the main question in each case was whether partial dependency had been established, having regard to s. 22 of the Workmen's Compensation Act, 1923. That section is in the following terms: "For the purposes of the principal Act, a person shall not be deemed to be a partial dependant of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessaries of life suitable for persons in his class and position." This provision is new, and, in my opinion, certainly introduces a new test of dependency. It seems definitely to establish the principle that, in deciding the question of partial dependency, the Court is bound to

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have regard to the standard of living that obtains among persons of the same "class and position" as the person claiming to be dependent. This appears to me to be just what under the old Act the House of Lords in *Main Colliery Co.* v. *Davies* (1) said that the Court should not do. In that case Lord Halsbury said (2): "I am quite certain that no human intellect would be able to ascertain exactly what the standard was if one had to deal with such a question —a standard dependent upon what was the ordinary course of expenditure in the neighbourhood and in the class in which the man lived. To my mind that is a problem so extremely obscure that I cannot believe that the Legislature intended it to be solved. What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family seems to me to be the only thing which the county court judge could properly regard." The contrary had previously been held in *Simmons* v. *White Brothers* (3), in which the Court of Appeal expressed its approval of the following passage from Minton-Senhouse and Emery on Accidents to Workmen, p. 156: "Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits and be decided as a question of fact by the arbitrator." This decision of the Court of Appeal was in effect overruled by the *Main Colliery Co.'s* case (1), but the new Act now restores the law as laid down in *Simmons'* case (3), and renders it incumbent on the Court to consider in each case what are "the ordinary necessaries of life suitable for persons of the class and position" of the applicant. This, I think, is equivalent to saying that it must make up its mind as to what is the standard of living of persons of that class and position. That is a task which,

(1) [1900] A. C. 358. (2) [1900] A. C. 362.
(3) [1899] 1 Q. B. 1005.

in the passage already quoted, Lord Halsbury said that no human intellect could accomplish; but the Legislature evidently thinks that it is not beyond the powers of a county court judge, so it becomes my duty to grapple with the problem in the three cases which I have now to decide.

Before dealing specifically with those cases, however, there are a few general remarks which I desire to make as to the considerations which I think should guide me in deciding questions arising under s. 22 of the Act of 1923.

I doubt whether this new provision is likely in practice to make so very much difference as seems to be assumed by some people. It seems to have been thought that the section will revolutionize the practice of county court judges in dealing with questions of "partial dependence." I think, however, that in the great majority of cases it will make no difference at all. It is only occasionally, that is to say in more or less exceptional cases, that its effect will be felt. As a general rule, when you find that the head of the family has adopted a certain scale of expenditure, I think that prima facie the scale adopted will be, and ought to be, regarded as fixing the standard of living of persons of that man's class and position. It is at any rate prima facie evidence that the man himself considers that scale of expenditure necessary to maintain his family in the position which he considers to be his, and unless the scale is on the face of it grossly excessive, or there is evidence to show that it is in fact higher than the standard at which persons of the same station in life generally and properly aim, I think it ought to be adopted as the standard with reference to which one must determine whether the applicant was partially dependent on the deceased for the ordinary necessaries of life. In other words, the head of the family is prima facie the judge of the scale of expenditure necessary to maintain the family suitably to their position. No doubt cases occasionally occur in which it is clear that a family's actual expenditure would not be a fair test of the standard of living of persons of the same class and position, and s. 22 is probably intended to meet such cases; but I cannot help thinking that in the majority of

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cases with which county court judges will have to deal "what the family was in fact earning, what the family was in fact spending for the purpose of its maintenance as a family," will continue to be the principal factor in determining whether the applicant depended partly on the deceased for the ordinary necessaries of life suitable to his class and position.

It will no doubt often be found that the expenditure per head of the applicant's family is considerably greater than that of the majority of families, the heads of which follow the same calling as the applicant; but that, in my opinion, would not be sufficient by itself to justify one in saying that the applicant was spending more than was necessary to maintain his family in a manner suitable to his class and position. One cannot say that there is a common standard for all men engaged in the same employment; for the scale of expenditure varies greatly from family to family and depends upon a variety of circumstances, such as the number of a man's children, their sexes and ages, whether any, and if so how many of them are working, and the amount of their wages. Moreover, although a man's occupation would be an important factor in determining his class and position, that question does not depend solely on his occupation; nor does a man necessarily associate chiefly with those who follow the same calling. A man's "position" indeed very largely depends upon his actual expenditure, and there is no doubt that what a man spends goes far to decide who his associates shall be.

Another point to be remembered is that in times of bad trade and low wages the actual expenditure of the majority employed in a particular occupation may be much below what is necessary to enable them to maintain the standard of life at which they legitimately aim, and therefore the expenditure of the majority ought not to be made the test of the standard of life of a man who, for one reason or another, has been able to spend on his family more than the majority of his fellows.

For these reasons it seems to me that in the majority of cases the actual expenditure of a family will be prima facie

evidence of what is the standard of life of that family. On the other hand, the amount of the expenditure may be on the face of it so high as to compel any reasonable man to say it must be in excess of what is reasonable to maintain the family in a manner suitable to its position, or evidence may be forthcoming to show that in fact much of the actual expenditure of the family was upon things or for purposes which could by no possibility be regarded as necessaries. In such cases the actual expenditure could not be relied on as the test of the applicant's standard of life.

I ought perhaps to add a word as to the meaning of the expression "ordinary necessaries of life" as used in the section. It may possibly be suggested that "ordinary necessaries" do not include comforts, still less luxuries, and that the use of this expression indicates that the Legislature did not intend that the standard of life should be taken as a test of dependency when that standard is so high as to include comforts or luxuries. As to this, I can only say that to discriminate between necessaries, comforts and luxuries, without reference to the standard of life, is, in my opinion, impossible, and the only safe course is to give to the word "necessaries" the same meaning as has been attached to the word in other connections, as for instance in connection with contracts by infants. Accordingly I understand the word "necessaries" as including all such things as are necessary "to maintain" the particular person "in his state, station and degree."

Having stated what appear to me to be the general principles by which I ought to be guided in applying s. 22 of the new Act, I will now deal specifically with each of the three cases now before me:—

KENNEDY *v.* HORDEN COLLIERIES, LIMITED.

In this case the deceased, a young man of twenty-one years, was living at home with his parents and an invalid sister. His wages were 1*l.* 15*s.* 6*d.* per week, and he paid the whole of them to his mother, who out of them provided him with his food, clothing, and a sum every week for pocket money.

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The father's wages were 3*l.* 4*s.* 6*d.* per week, and he had a house and coal free; and it is contended on behalf of the employer that this was sufficient to enable him properly to maintain himself, his wife, and his daughter, without the aid of his son's wages, and that he was therefore not a partial dependant of his son, within s. 22 of the new Act. Whether this is or is not correct must, in my opinion (as I have already pointed out), depend upon how much was necessary to maintain the father and his family in a manner suitable to his class and position—in other words, his standard of living. Therefore we must first see what he was in fact spending during his son's lifetime. The evidence shows that the family income was 5*l.* a week, which had to be divided between four persons (the father, the mother, the son, and the daughter), and that in addition they had house and coal free, the value of which is agreed at 5*s.* per week. Mr. Heath on behalf of the applicant contends that the value of the house and coal ought to be left out of account altogether, but it is perfectly clear that, when considering how much is required to supply a family with necessaries, you cannot ignore the fact that they are already supplied with two important necessaries—namely, fuel and shelter—as, these items having been provided for, the family would have so much the more to spend on food, clothing and pocket money. I think one must then deduct from this 5*l.* the amount which the mother handed back to the son for pocket money, and if we put this at an average of 5*s.* per week, which upon the evidence is what it would probably work out at, we get a sum of 4*l.* 15*s.* for four of them, which works out at 1*l.* 3*s.* 9*d.* per head. Was this more than was required to supply the family with the ordinary necessaries of life suitable to the father's class and position, bearing in mind that they had their house and fuel free? The mother states, in effect, that they were unable to save anything out of it. If they had, in effect, put something aside, I do not know that it ought to tell against them; for it does not necessarily follow that because a man makes some provision for his widow in the event of his dying before her, and for his own old age, his income is therefore more

than sufficient for his needs. It may, I think, fairly be argued that it is a man's duty in the present day to make, if he can, such reasonable provision for the future as will ensure that neither he nor his widow will become a burden on others or on the public, and therefore that such reasonable provision ought to come under the head of "necessaries." But, in the present case, the family did not save anything, but spent the whole of their income, which they say was no more than sufficient for their daily needs. These needs apparently include food and clothing for four adults, pocket money for the father, medical attendance for the daughter, and occasional change of air for her. All these matters can, I think, fairly be called necessaries, provided that the amount spent on each is reasonable. Was the sum of 4*l.* 15*s.* per week for a family of four adults, or 1*l.* 3*s.* 9*d.* per head, more than was required to enable the family to obtain such a supply of these things as was reasonably necessary to maintain them in a manner suitable to their class and position? I am quite unable to say that it was. No doubt, a very considerable number of miners' families have to live on very much less, but, as I pointed out in my preliminary observations, that is not a sufficient ground for saying that it is more than what is required to supply a particular family with the ordinary necessaries suitable to the father's class and position. Moreover, drawing on my own experience, I cannot say that an expenditure of 5*l.* per week for four adults strikes me as being very exceptional among miners' families.

Therefore, applying the principles that I have already laid down for my own guidance, I hold that the actual expenditure of the family at the time of the son's death represents the amount required for the provision of the ordinary necessaries of life suitable for persons of the father's class and position.

Now the son's contribution to the family fund (after deducting the amount he received back for pocket money) was about 1*l.* 10*s.* 6*d.*, and this I think was in excess of what he cost; his death must therefore, in my opinion, have caused some loss to the family; for whereas they had

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previously an average of about 1*l.* 3*s.* 9*d.* per head to spend on the things I have enumerated, they have now only 1*l.* 1*s.* 6*d.* per head to spend on the same things.

I think therefore that "partial dependency" has been established, and I must award the applicant such a sum as I consider "reasonable and proportionate to the injury" by the son's death.

Now the loss to the family is, roughly, the difference between his contribution to the family fund (1*l.* 10*s.* 6*d.*) and the cost of his keep, and for the purposes of this calcution I do not think I ought, as suggested by Mr. Richardson, counsel for the respondents, to include in the cost of his keep a share of the 5*s.*, which is said to be the weekly value of the house and coal. There may be cases in which it would be proper to include something under this head, as, for example, where, in consequence of the son's living at home, the parents are prevented from taking in a lodger, as they would otherwise have done; but I do not think that any ground has been shown for doing so in the present case.

It is impossible to say precisely what it did actually cost to keep the son; the amount was not necessarily the same as the average expenditure of the family per head, although I think it is possible that in the present case the family average of 1*l.* 3*s.* 9*d.* per week would not be very far wrong. On the whole, I think that the net profit which the father made out of the son's contributions was somewhere between 6*s.* 6*d.* and 7*s.* per week. In capitalizing this sum I have to allow on the one hand for the possibility of the son's contributions being increased in the future, and on the other hand for the possibility of their being withdrawn altogether, as, for instance, in consequence of his marriage. After taking all the circumstances into consideration, I assess the compensation at 65*l.*, and this sum I award to the applicant accordingly.

BAMFORD *v.* CHARLAW AND SACRISTON COLLIERIES, LIMITED.

In this case the family consisted of a father, mother, two sons, aged thirty and seventeen respectively, and a daughter,

aged fifteen—five in all. All the males were earning money, and the total earnings were 7*l.* 19*s.* 7*d.* per week at the time of the death of the deceased, and were made up as follows :—

Father	3*l.*	9*s.*	8*d.*	per week.
Deceased (aged 30) . .	3*l.*	9*s.*	0*d.*	,, ,,
Brother (aged 17) . .	1*l.*	0*s.*	11*d.*	,, ,,
	7*l.*	19*s.*	7*d.*	

In addition, the father had house and coal free, and the deceased had army reserve pay of 7*s.* per week. The deceased paid over all his wages to his mother, and received back 10*s.* to 12*s.* for pocket money, so that his net contribution was about 2*l.* 17*s.*, and the family purse may be said to have been about 7*l.* 7*s.* per week for a family of five, say 29*s.* 4*d.* per head. Apart from the deceased and his contributions, the income available for the remaining four members of the family was 4*l.* 10*s.* 7*d.*, or 1*l.* 2*s.* 8*d.* per head, in addition to house and coal; but the family were spending much more than this. They were in fact spending the whole sum of 7*l.* 7*s.*, or 29*s.* 4*d.* per head, and this sum prima facie must be regarded as what the father deemed necessary to maintain the family properly in their position. It may be said that this is a large amount, when one considers that it was apparently spent mainly on food and clothes, that the deceased bought some, at any rate, of his clothes out of his pocket money and reserve pay, and that there was apparently nothing spent on education; but there is only very scanty evidence of what the money was in fact spent on. We have not even been told whether a part time servant was kept, as is, I believe, not uncommon among miners; if so, it might account for a good deal. I daresay the case is rather near the border line, but I am not prepared to say that the family expenditure, on the face of it, was in excess of what was required to supply the family with what was necessary and suitable for their position. At any rate, I think the father is entitled to say that without the deceased's contributions the family income would have been insufficient for that purpose. Therefore in my opinion dependency has been established.

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The difference between the amount of the deceased's contributions at the time of his death and the cost of his maintenance is in this case very considerable; but I do not think that I am bound to award to the applicant the capitalized value of the whole of such difference. The amount awarded must not only be "proportionate to the injury," but must be "reasonable," and in making up my mind as to what is reasonable, I think there are a number of considerations which ought to be taken into account, including not only what might have happened if the deceased had lived, but what may yet happen in the future. There is not only the possibility that the deceased's contributions might have decreased, or been entirely withdrawn, but the possibility that the surviving son might increase his contributions, or the daughter leave home and cease to be a burden upon the family fund, so that the father would require less to maintain his standard of living. Even if the possibility of the deceased marrying were ruled out, it seems quite probable that as his brother's earnings increased he would have reduced the amount of his own contributions, and that he would also have done so in the event of the youngest girl beginning to earn her own living, as her sisters were doing. However, when all these things are taken into account, I think it is clear that the applicants would be entitled to a substantial sum, and in the circumstances I think the sum of 150*l.* would about meet the case, and I accordingly award this sum to the applicants.

BEVAN *v.* JAMES JOICEY AND COMPANY, LIMITED.

In this case the total family purse was slightly less than in the last case; there were seven in the family instead of five, and four of them were earning wages instead of three. The family on the whole were younger than in the last case, and consisted of:—

	Per week.
Father (aged 51), a coal hewer, earning .	3*l.* 6*s.* 5*d.*
Mother (aged 47).	
Deceased (aged 23), a coal hewer, earning	2*l.* 9*s.* 3*d.*

	Per week.
Brother (aged 20), a driver, earning .	1*l.* 1*s.* 7*d.*
Brother (aged 17), a driver, earning .	15*s.* 6*d.*
Sister (aged 12).	
Sister (aged 8).	
	7*l.* 12*s.* 9*d.*

In addition the family had, and still have, a house and coal free. The deceased paid his wages to his mother, who said that she let him have from 7*s.* to 8*s.* for pocket money, and paid his union subscription of 2*s.* 8*d.* per fortnight.

I have considered all the circumstances, and hold that partial dependency has been established. In spite of the difference between the last case and this, both in the ages of the families and their earnings, I have, after taking all the circumstances, and applying the same principles, assessed the compensation at the same figure in this case as in that, and I accordingly award the sum of 150*l.*

The respondents in the three cases appealed. The three appeals were heard together on May 22, 1925.

Neilson K.C. and *T. Richardson* for the appellants in the three cases. The learned county court judge put the right question to himself in all three cases, but applied something which he had not formulated for its solution.

In *Simmons* v. *White Brothers* (1) Collins L.J. adopted as a test of dependency the statement in Minton-Senhouse and Emery on Accidents to Workmen, p. 156, that "Dependent probably means dependent for the ordinary necessaries of life for a person of that class and position in life. Thus the financial and social position of the recipient of compensation would have to be taken into account. That which would make one person dependent upon another would in another case merely cause the one to receive benefit from the other. Each case must stand on its own merits and be decided as a question of fact by the arbitrator." The matter was discussed by Lord Halsbury in *Main Colliery Co.* v. *Davies* (2), who took the view that the question of dependency was one of

(1) [1899] 1 Q. B. 1005, 1007. (2) [1900] A. C. 358, 362.

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fact, and declined to assume that the Legislature had contemplated any particular "standard" of living. The recent case of *Peart* v. *Bolckow, Vaughan & Co.* (1) in this Court has decided that the effect of s. 22 of the Act of 1923 is to restore the old rule for ascertaining dependency adopted by the Court of Appeal in *Simmons* v. *White Brothers.* (2)

In determining what are the ordinary necessaries of life suitable for persons in the applicant's position in life the Court must have regard not to the expenditure of the particular applicant's family, but to the expenditure of families in the same class as that to which he belongs. Here the learned county court judge has had regard entirely to the expenditure of the particular families and has not considered the expenditure of families in the class to which they belonged, where in many cases the family is supported by one wage-earner only.

[WARRINGTON L.J. You cannot say that there is a common scale of expenditure for all men in the same employment.]

We ask that the Court should lay down some general directions for the guidance of county court judges in dealing with these matters.

Sir Henry Slesser K.C. and *C. B. Fenwick* for the respondent in each of the three cases were not called upon.

POLLOCK M.R. These three cases are brought by way of appeal from the decision of the learned county court judge, who took time to consider his judgment in the three cases which came before him at three different county courts within his jurisdiction, but which involved the same point—namely, the question of whether or not there was, on the deaths of the members of the families who had suffered accidents, a partial dependency of the member of the family, represented in each case by the father, upon the decease, such as to justify a claim being made by the father in respect of that loss, or partial dependency, and in respect of which the compensation ought to be paid Now the question of the right to recover in respect of that dependency depends upon s. 22 of the

(1) [1925] 1 K. B. 399. (2) [1899] 1 Q. B. 1005.

Workmen's Compensation Act of 1923. The effect of that section was considered by this Court a very short time ago in *Peart* v. *Bolckow, Vaughan & Co.* (1) It was pointed out in *Peart's* case (1) that the effect of s. 22 was to restore the law as laid down by Collins L.J. in *Simmons* v. *White Brothers* (2), and to discard the rule which was stated by Lord Halsbury in *Main Colliery Co.* v. *Davies.* (3)

But the problem that is still left for the county court judge to decide under s. 22 is an extremely difficult one. Each case, of course, must, in the end, depend upon facts which are proved before the county court judge, and this Court can only intervene upon an award made by the county court judge if it is clear to this Court that he has misdirected himself on a point of law. Now, these three cases are brought before us in the hope that some possible new light may be thrown upon this old problem. But it is really impossible for this Court, any more than it is possible for an Act of Parliament, to lay down a specific rule which shall form a touchstone enabling one to solve a problem, the complexity of which is only measured by the manifold divergence of human life itself.

The learned county court judge in the present case prefaced his decision in the three cases by what I have described as an exordium dealing with the state of the law as he conceived it to stand at the present day, and I desire for my part to pay a tribute to him and to say that he has grasped all the principles applicable to the problem which must arise before him with great accuracy, and has stated them clearly, and, I think, correctly. He has not overlooked in the judgment various matters which form checks and counter-checks in the problem. He has no doubt not overlooked, and rightly so, the words which were used by Lord Halsbury in *Main Colliery Co.* v. *Davies* (3) with reference to the problem of ascertaining a standard of living which was dependent on what was the ordinary course of expenditure in the neighbourhood in which the man lived. Lord Halsbury said (4):

(1) [1925] 1 K. B. 399.
(2) [1899] 1 Q. B. 1005, 1007.
(3) [1900] A. C. 358.
(4) Ibid. 362.

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"To my mind that is a problem so extremely obscure that I cannot believe that the Legislature intended it to be solved. What the family was in fact earning, what the family was in fact spending, for the purpose of its maintenance as a family seems to me to be the only thing which the county court judge could properly regard."

Now under the law at the present time that is not the only thing which a county court judge could properly regard, but the law has not said it is not one of the things which a county court judge may properly regard, and in the able judgment of the county court judge he has put the standard derived from what the family was in fact earning, or what the family was in fact spending, in its proper perspective, because he has treated it only as a prima facie piece of evidence which may be used, but with correction and alteration by other considerations which are superadded to it. I find it myself impossible to add to or vary the judgment which has been delivered by the county court judge in relation to facts which he had to consider in each of the three cases. Finally, at the end of his judgment he deals with the meaning of the word "necessaries" and I think he attaches the right meaning to it. It is a word which is used in the case of a supply to infants, and has certain attributes attached to it in law, and when "necessaries" is used in the present case it is intended to be used with the meaning which it would have—a somewhat varied meaning—according to the consideration of the class and position of those persons in respect of whom it is used. The learned county court judge again gives expression to the fact that you may find, upon evidence if it is forthcoming, that the actual expenditure of the family goes far beyond what may be regarded as "necessaries," but he has conceived, and rightly so, that the standard which you are to apply to a particular case must depend, not only upon the class and position in which the family lives, but their own particular circumstances, and indeed the particular circumstances applicable in the district at the time the problem has to be faced. For my own part, I feel it is impossible to lay down any additional rules which would be of any guidance,

and I take the statement of the learned county court judge as one which is an admirable summary of a problem difficult and different in every case, which has to be solved when the question arises.

Now, if we are satisfied with the statement of the law by the county court judge, we must take the facts as found by him. After he had stated the law, he applied the law to the facts before him. I cannot see that with regard to any of the cases that were before him he went astray from the doctrines which he himself had summarized.

It appears to me, therefore, his judgment was right, and that in each of these three cases we cannot, and ought not, to interfere with it. The appeal in all three cases will, therefore, be dismissed with costs.

WARRINGTON L.J. I agree. I only wish to add that I agree in every statement of the law made by the learned county court judge. I can really see nothing to quarrel with him in the conclusions at which he has arrived. He seems to have directed himself accurately. That being so, and the question in each case being a question of fact, we cannot interfere with the learned county court judge's decision.

ATKIN L.J. I agree. I think this section is going to cause more difficulty hereafter, but it appears to me in this case no difficulty at all arises, because I apprehend, when once it has been established as a matter of fact that the whole of the family expenditure was made upon what were necessaries suitable for the class and condition of the persons composing the family, and when it is also established that there is a balance of the deceased's wages which formed part of that income expended—it appears to me that one necessarily establishes dependency within the terms of the section, because there you have the total expenditure all spent on necessaries, and you have in fact a contribution by the deceased person to that expenditure, and, therefore, to necessaries.

Now, that is what the learned county court judge has

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found in fact in these cases, with plenty of evidence in support, because the mother, I think, was called in each case, and said that the whole of the money was spent on necessaries, in substance; that they could not save anything, and that in some cases they had less food now the son had gone than they had before. That is a very simple case.

The learned judge has laid down some general principles which I do not think necessarily arise, but which, so far as I can see, it is unnecessary to quarrel with. In substance what he has said is this: though the new section makes a change in the law, yet, in fact as a matter of proof, it is a reasonable thing to start with a prima facie assumption that what the family expends, it, in fact, expends on necessaries. And that was really what Lord Halsbury said was all you need have regard to. What the learned judge said was, you may start with the prima facie assumption that, in a working household of this kind, the father spends his money on necessaries, and on nothing but necessaries. He says that you can rebut that presumption by showing that the scale of living has been much above the ordinary scale of living, and that there are items of the expenditure which show conclusively that the whole of the expenditure was not made on necessaries.

Then there will arise the question which I do not propose to solve at the present moment, because it is not before me, as to what happens in the case of a man who makes a contribution towards income all of which it is possible to spend on necessaries judging by the objective standard of that class and position of family, but where the father, in fact, spends part of that amount on matters which are not and which could not be considered to be, necessaries, and thereby deprives his family of the proportionate amount of necessaries which otherwise they would have had. One might turn that into terms of drink, and ask what would happen if it were proved that the husband in fact spent 15*s.* or 20*s.* a week in drink, where if he had not spent it in drink, having regard to the class of family where he lived, the total amount, including the 20*s.*, might have been, and should have been, spent upon

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what would be considered necessaries. As I say, I do not propose to solve that problem. It does not arise in this case.

I agree that the findings of the learned judge in this case are right. There is plenty of evidence to support them, and I think these appeals should be dismissed.

Appeals dismissed.

Solicitors for appellants in all three cases: *Rawle, Johnstone & Co., for Cooper & Jackson, Newcastle-upon-Tyne.*

Solicitors for respondents in all three cases: *Hyman Isaacs, Lewis & Mills, for Patrick Bennett & Maddison, Newcastle-upon-Tyne.*

W. I. C.

[IN THE COURT OF APPEAL.]

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TWIDALE *v.* LONDON AND NORTH EASTERN RAILWAY COMPANY.

Workmen's Compensation—Compensation—Basis of Calculation—"Average weekly earnings"—Casual Labourer—Total Incapacity—Wages paid by other Employers besides Respondents—Whether they can be taken into Consideration in computing "average weekly earnings"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., para.* 1 (*b*); *para.* 2 (*a*)—*Workmen's Compensation Act*, 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 4.

The applicant, who was a dock labourer, met with an accident whilst in the employment of the respondents, which resulted in his total incapacity. His employment was of a casual nature: he was employed by the job, but paid daily. Although he worked principally for the respondents, he was in fact employed from time to time by other employers. In arbitration proceedings in the county court to determine the amount of the weekly payment to which the applicant was entitled under the Workmen's Compensation Acts, a statement was put in showing the payments made by the respondents during the twelve months preceding the accident. This statement admittedly showed that in the last seven weeks, during which period he apparently worked for the respondents alone, he received from them altogether a sum which, when divided by the number of weeks, gave an average of considerably over 3*l.* per week. It was also admitted that the sum earned during the whole twelve months if divided by the number of days on which he was actually employed by the respondents would work out at more than 3*l.* per week, but that if divided by the number of weeks in which he worked for the respondents, it would give an

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average of considerably less than 3*l.* per week. It was further admitted that during this period the applicant worked for other employers besides the respondents, and the applicant stated in evidence that if the sums received by him from such other employers were added to the amounts received from the respondents, his average earnings would amount to more than 3*l.* per week. The respondents put in statements showing the amounts paid by them during the same twelve months to two other dock labourers in the same grade as the applicant. These statements did not show the number of days worked, but the total sum earned in each case when divided by the number of weeks gave a figure of considerably less than 3*l.* It was, however, admitted that each of these men worked during the twelve months for other employers besides the respondents. The county court judge, being of opinion that he had sufficient material to enable him to compute the applicant's "average weekly earnings" without having recourse to the proviso in para. 2 (*a*) of Sch. I. to the Workmen's Compensation Act, 1906, held upon the evidence that the applicant was being remunerated at the rate of over 3*l.* per week, and made an award for the weekly sum of 1*l.* 10*s.*:—

Held, that the question was one of fact for the county court judge; that in computing the average weekly earnings he was entitled to take into consideration the wages paid by the other employers besides the respondents; and that there was evidence before him which enabled him to arrive at the conclusion he did.

Quaere, whether having regard to *Barnett* v. *Port of London Authority* [1913] 2 K. B. 115 and *Thomson & Co.* v. *Mackay* (1921) 14 B. W. C. C. 143; [1921] W. N. 230, *Cue* v. *Port of London Authority* [1914] 3 K. B. 892 can now be regarded as good law.

APPEAL from an award of the judge of the West Hartlepool County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The only question in dispute in this case was the amount of the weekly payment to which the applicant was entitled under the Workmen's Compensation Acts for the period during which he was totally incapacitated.

The facts as stated by the county court judge were as follows:—

The applicant, who was a dock labourer, met with an accident which caused his incapacity at a time when he was employed on a job by the respondents. His employment was of a casual nature: he was employed by the job, but paid daily. Although he worked for the respondents more than for any one else, he was in fact employed from time to time by other employers. An agreed statement was put in showing

the payments made by the respondents to the applicant during the twelve months preceding the accident. This statement admittedly showed that in the last seven weeks (during which period he apparently worked for the respondents alone) he received from the respondents altogether a sum which, when divided by the number of weeks, gave an average of considerably over 3*l.* per week. It was also admitted that the sum earned during the whole twelve months, if divided by the number of days on which he was actually employed by the respondents, would work out at more than 3*l.* per week, but if divided by the number of weeks in which he worked for the respondents, it would give an average of considerably less than 3*l.* per week. It was further admitted that during this period the applicant worked for other employers besides the respondents, and the applicant stated in evidence that if the sums received by him from such other employers were added to the amounts received from the respondents, his average earnings would amount to more than 3*l.* per week. The applicant's counsel tendered in evidence statements showing amounts paid to the applicant by some of the other employers by whom the applicant was employed during the period in question, but the respondents' solicitor objected to the admission of such evidence, and it was not pressed by the applicant's counsel. The respondents put in statements showing the amounts paid by them during the same twelve months to two other dock labourers in the same grade as the applicant. These statements did not show the number of days worked, but if the total sum earned in each case was divided by the number of weeks, a figure was arrived at of considerably less than 3*l.* It was, however, admitted that each of these men worked during the twelve months for other employers besides the respondents.

The county court judge in giving judgment on the above facts said: "The solicitor for the respondents contended that in order to arrive at the applicant's 'average weekly earnings' I ought to take the total amount paid by the respondents during the twelve months to one of these men (or alternatively to the applicant) and divide this amount by

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fifty-two, ignoring the fact that during the same period the men were employed by other employers besides the respondents. I declined to accept this view, being of opinion that the method suggested was not the method 'best calculated to give the rate per week at which the applicant was being remunerated.' I was of opinion that there was sufficient material to enable me to compute the applicant's average weekly earnings without having recourse to the proviso in para. 2 (*a*) of Sch. I. to the Act of 1906, and I held upon the evidence that the applicant was being remunerated at the rate of over 3*l*. per week. I accordingly awarded the applicant the maximum weekly sum of 1*l*. 10*s*."

The respondents appealed. The appeal was heard on May 27, 28, 1925.

W. Shakespeare and *Hugh Beazley* for the appellants. The authorities have decided that in computing the "average weekly earnings" (1.) that it is only the earnings of the workman whilst in the employment of the same employer that can be taken into consideration; (2.) that in considering this question it must be seen whether the period of employment is sufficiently long to enable a fair average to be arrived at; and (3.) that where the workman has been in the employment of successive employers the total amount of his weekly earnings for the year cannot be taken and divided by fifty-two in order to arrive at his "average weekly earnings." The principles to be adopted in such a case are stated in the judgments of the Court of Appeal in *Cue* v. *Port of London Authority*. (1)

In estimating the workman's average weekly earnings the Court must have regard to all the known incidents of the trade in order to arrive at a true average: *Anslow* v. *Cannock Colliery Co.* (2) It cannot pick out a period when trade is good and disregard the period when it is bad. In the case of casual labourers there are periods of the year when they can obtain no work, and that fact is to be taken into account in estimating their average weekly earnings: *Cox* v. *George*

(1) [1914] 3 K. B. 892. (2) [1909] A. C. 435.

Trollope & Sons. (1) Regard must also be had to the personal qualification of the particular workman.

In the present case the respondent was employed by the appellants for parts only of forty-four weeks of the twelve months preceding the accident, and the total amount of the wages received by him during that period from the appellants divided by forty-four would amount to an average of 2*l.* 9*s.* 8*d.* per week, and the compensation would therefore be 1*l.* 4*s.* 11*d.* per week. The respondent however claims that the correct amount of his "average weekly earnings" is 3*l.*, and the compensation 1*l.* 10*s.* He arrives at the sum of 3*l.* by taking the average of the wages paid to him by the appellants during the seven weeks immediately preceding the accident when he was employed by them alone. This method of compensation is, it is submitted, not correct: *Perry* v. *Wright* (2); *White* v. *Wiseman.* (3)

The county court judge, it is submitted, was wrong in not adopting the method provided by the proviso in para. 2 (*a*) of Sch. I. to the Act of 1906, which expressly mentions the casual labourer, as it was not otherwise practicable for him to compute the respondent's average weekly earnings.

[ATKIN L.J. *Thomson & Co.* v. *Mackay* (4) appears to show that you obtain the average from the amounts earned from different employers.]

It is submitted that a whole year must be taken in order to ascertain the nature and incidents of the employment, as it cannot be assumed that because the workman has received certain wages during part of the period, he will continue to receive the same wages during the remainder of the period. That is illustrated by the present case, where the respondent received in wages an amount which would give an average of over 3*l.* a week. If the first seven weeks of the year had been taken instead of the last seven weeks, the average weekly earnings would have been 1*l.* 19*s.* In para. 2 (*a*) of Sch. I. the words "the rate per week at which the workman was being remunerated" mean remunerated by the same

(1) [1916] 2 K. B. 682.
(2) [1908] 1 K. B. 441.
(3) [1912] 3 K. B. 352.
(4) 14 B. W. C. C. 143; [1921] W. N. 230.

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employer: *Cue* v. *Port of London Authority* (1); and see *Carter* v. *John Lang & Sons.* (2) The county court judge was therefore not entitled to take into consideration the wages received by the respondent from other employers.

[ATKIN L.J. referred to *Snell* v. *Bristol Corporation.* (3)]

T. Richardson for the respondent. In computing the average weekly earnings of the respondent the Court cannot, it is submitted, ignore the fact that he was working for other employers besides the respondents. There is nothing in *Cue's* case (1) which decides that the county court judge is to take the one day in the week when the respondent was working for the appellants and ignore the other five days when he was working for other employers. The objection in that case was to taking the higher rate of remuneration paid by the other employers. There is nothing in that case which overrules the directions given in *Perry* v. *Wright.* (4)

[POLLOCK M.R. There appears to have been a complete divergency of opinion between Cozens-Hardy M.R. and Swinfen Eady L.J. in *Cue's* case. (1)]

Shakespeare in reply. *Cue's* case (1) is dealt with in *Underwood* v. *Perry & Son, Ld.* (5) In arriving at the amount of the average weekly earnings, regard must be had to the nature and incidents of the employment. Here the employment during the last seven weeks preceding the accident was still casual.

POLLOCK M.R. This is an appeal from the learned county court judge, who had to determine what was the right measure to apply in determining the weekly payment to be made to a casual labourer. The respondent Twidale is a casual dock labourer and worked not infrequently for the appellants, the London and North Eastern Railway Company. On September 22, 1924, he met with an accident. The appellants admitted liability, and in fact the measure of his incapacity is total. The arbitration went before the learned county

(1) [1914] 3 K. B. 892.
(2) (1908) 1 B. W. C. C. 379.
(3) [1914] 2 K. B. 291.
(4) [1908] 1 K. B. 441.
(5) (1922) 15 B. W. C. C. 257, 261.

court judge to determine under those circumstances what was the sum at which the weekly payment ought to be fixed. The learned county court judge came to the conclusion that 1*l.* 10*s.* was the proper sum.

Mr. Shakespeare, who has given us great assistance by his argument in this case, has referred to a number of cases, and shortly the point he takes against the learned judge's decision is that the county court judge had not evidence which, applying the reasoning of the cases which are binding upon us, enabled him to come to the conclusion that 3*l.* was the proper amount of the average weekly earnings. There is no question but that the employment of the respondent was of a casual nature. He was employed by the job, and paid daily. From an estimate of his earnings which was before the county court judge it appears that in the year from September, 1923, to September, 1924, the respondent was employed during a number of weeks, I think as many as forty-six out of the fifty-two, and that in two or more of those weeks he earned less than 10*s.* a week, and the appellants say that treating those weeks as practically not producing wages comparable with the other weeks, and taking therefore the fact that he was employed during parts of forty-four weeks, it will be found if the moneys which have been paid to him be divided up over the year that the sum he received was an average sum of 2*l.* 9*s.* 8*d.* a week. As a matter of fact there was also before the county court judge a statement of the earnings which had been paid by the appellants to two other men, McDermott and Kelly, from which it appeared that if their earnings were treated in the same way the former had received an average of 2*l.* 10*s.* 11*d.* a week, and the latter had received an average of 2*l.* 10*s.* 5*d.* a week. Upon that Mr. Shakespeare contends that whatever else there may be evidence of, there was no evidence which enabled the county court judge to find in favour of the respondent so large a sum as 3*l.* a week, and therefore that in some way he must have applied a wrong standard and reached a wrong conclusion as to amount.

The case has to be decided on paras. 1 and 2 of Sch. I. to

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the Act of 1906, and it is not easy to find an absolute rule by which the right scale is to be ascertained. Para. 1 provides: "The amount of compensation under this Act shall be—(*a*) where death results from the injury—(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury." Now, this is a case of incapacity and not of death; but even if it were one of death I think in the case of a casual labourer one thing is plain, and that is that that standard—namely, the earnings in the employment of the same employer during the three years next preceding the injury—is not applicable. I say that because that was so specifically stated by Swinfen Eady L.J. in *Cue* v. *Port of London Authority*. (1) He there says: "In the present case, as there was only a casual employment, paragraph 1 (*a*) (i.) cannot be applied." If that be so, where are we to find what is the standard? I think it is to be found in para. 2: "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman, the following rules shall be observed: (*a*) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." Those words are stated by Fletcher Moulton L.J. in *Perry* v. *Wright* (2) to be the dominant words of the section. He says: "The dominant note is, in my opinion, the provision that the 'average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated,'" and in this difficulty he asks what is the method to be applied. Now it is not easy, I think, to reconcile all that was said in *Cue's* case (3) either with what would appear to be a right interpretation of the schedule or with all the observations which have been made in later cases, but it is to be observed that *Perry* v. *Wright* (2) was decided in 1908, and *Cue's* case (3) in 1914, and that both those cases

(1) [1914] 3 K. B. 892, 901. (2) [1908] 1 K. B. 441, 459.
(3) [1914] 3 K. B. 892.

were treated as consistent in *Cox* v. *George Trollope & Sons* (1), a case decided in 1916. Those dominant words have been decided to introduce a question of fact which has to be determined by the county court judge. Therefore the earnings are to be computed by the county court judge, who has all the facts before him, in a manner best calculated, in his opinion, to give the rate per week at which the workman was being remunerated. There is a proviso to those dominant words, namely—"Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration," then regard may be had to another standard, namely, the amount which was earned by a person in the same grade, employed at the same work by the same employer. It was pointed out by Cozens-Hardy M.R. in *Perry* v. *Wright* (2) that those words of the proviso which enable the county court judge, where the nature of the employment is casual, to seek another standard are not mandatory; they give liberty, but do not impose an obligation on him to follow out the proviso.

We therefore come back to this, that the learned county court judge was not bound to follow the terms of the proviso, but if he was satisfied that he had material which was best calculated to give the rate per week, he was entitled to come to his conclusion. The learned county court judge in his judgment has definitely said that he was of opinion that he had sufficient material to enable him to compute the respondent's average weekly earnings without having recourse to the proviso. One turns therefore to see what it was he had before him. We have to regard this case from the point of view of the employment being that of a casual worker paid by the day. To my mind there is a danger of a mistake being made by any computation which is based upon an arithmetical calculation of a total sum paid to the man over a period of time divided up into either daily or

(1) [1916] 2 K. B. 682. (2) [1908] 1 K. B. 441, 451.

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weekly payments. That appears to me to be an attempt to introduce something like the basis of earnings in a continuous employment. We have to consider the matter from the point of view of the casual employment, and are not to be led aside into going back to para. 1 (*a*) (i.), as if this was continuous employment. No doubt it is true that there is material on which it could possibly be found that the respondent had been in the employment of the appellants, but the fact that he was paid day by day is a clear indication that the intention was to treat him as a casual labourer and to secure that he should not be upon the regular staff, that he should be in the nature of a person who if and when the appellants wanted to call for his services could be employed by them.

Bearing in mind those observations, I find that it is laid down in *Cue's* case (1), or appears from the headnote to have been so laid down, that the Court is not entitled to look at the earnings of a man in the same grade employed at the same work by the same employer for the purpose of guessing at a testing standard of what the weekly earnings in a particular case are to be. Those are materials to be considered, but there may be evidence of special personal skill and efficiency of the workman raising his average above the general average of such men. It appears to me that the learned county court judge fully appreciated the decision in *Cue's* case (1), and definitely says that he did not take the evidence which was provided by the earnings of McDermott and Kelly as binding upon him in any other sense than the sense in which he was entitled to use them under the authority of *Cue's* case (1), if that be the effect of *Cue's* case (1), and if *Cue's* case be right. There is to my mind some difficulty in following the reasoning and the conclusion in *Cue's* case (1), but assuming for the moment that that case does bind this Court, it appears to me that reading the learned county court judge's judgment aright he has definitely said that he declined to accept the view presented to him by the solicitor for the appellants, that "In order to arrive at the applicant's 'average weekly earnings' I ought to take the total amount

(1) [1914] 3 K. B. 892.

paid by the respondents (the present appellants) during the twelve months to one of these men (or alternatively to the applicant), and to divide this amount by fifty-two, ignoring the fact that during the same period the men were employed by other employers besides the respondents." That argument he definitely rejected. It appears to me, therefore, that the statement as to the amount of the average weekly earnings in the tables provided by the wages sheet, if there was a wages sheet, or the table before us of MacDermott and Kelly's wages, was not used by the county court judge as a testing standard. It appears to me that it may have been quite rightly used by him within the narrow limits of *Cue's* case (1) if those narrow limits be laid down by that case—namely, as indicative of the fact that the respondent was a man who like MacDermott and Kelly, who were employed as I understand in priority to him, had the personal qualifications for work and would be employed if there were work for him to do. I quite agree with Mr. Shakespeare, that this being a case of casual employment, we have to take into consideration the question whether there was work available for the respondent to do. We have to deal with the question of the maximum earnings that he could earn, and recognize that in some measure the work he had to do was seasonal. But taking all that into account it appears to me that the learned county court judge has not based his judgment upon any principle forbidden to him by law. He has taken all the facts before him; he has recited the material that was before him; he has rejected the somewhat attractive argument that was placed before him, but the conclusion at which he has finally arrived is this, that on looking at the earnings that were made by the respondent and not taking them as if they had been made by a man employed in the employment of the appellants for a period by the year or by the month or even by the week, but treating him as a casual employee, he had before him evidence indicative of the fact that at times he was able to earn 3*l.* a week and for several weeks very much larger sums

(1) [1914] 3 K. B. 892.

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than that. He had materials covering a period of months, and the learned county court judge, who is a master in these matters, definitely decided that they enabled him to compute the average weekly earnings in a manner best calculated to give the rate per week at which the workman was being remunerated without having recourse to the liberty given him by the proviso. I have said what I have because I do not think that either the table of the wages earned by the respondent himself or that of the wages earned by the other two workmen, MacDermott and Kelly, calculated and examined as a table of employment over a period of time, were regarded by the county court judge as the basis of his determination. What he did was to look at the result of casual employment by the appellants of the respondent, and he came to the conclusion, not looking at the last seven weeks preceding the accident I think at all, but at the various sums which had been earned by the respondent in a number of weeks, that while it would be unfair to take the standard which would be provided by the average of the last seven weeks, it would equally not be fair to the respondent to take an average based upon the whole period of the employment shown by the table. Equally it would be unfair to take a standard based upon the earnings between September and December only, but having regard to the qualifications of the respondent himself, to the fact that he was, as the facts showed, employed not infrequently by the appellants, it would be fair to estimate his wages not upon a mere average, but upon an all-round figure, and with the figures before him looked at in the light which I have indicated, I think there was evidence before him which would enable him to bring the sum up to as much as 3*l.* per week. If he had materials before on which his decision could be based we cannot interfere with him. It appears to me that he looked at the case, and rightly looked at it, as the case of a casual labourer whose wages, as shown by the table in one week at one time, rose as high as 7*l.* 12*s.* 3*d.*, and in another week ran down to something like a sovereign or between 1*l.* and 2*l.* With that material before him the learned judge

was satisfied that on the whole 3*l.* would be the right amount of the average weekly earnings to arrive at. This appeal fails, and must be dismissed with costs.

WARRINGTON L.J. The question in this case arises, and that I think is important, having regard to some of the authorities, not under para. 1 (*a*) (i.) of Sch. I. to the Act, but under para. 1 (*b*) to the same schedule, which is in these terms: "Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding 50 per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound." It is to be noticed that in dealing with the twelve months the Legislature does not say his average weekly earnings during the previous twelve months if he has been so long in the employment of the same employer, and in that respect it differs altogether from the provisions of para. 1 (*a*) (i.). The same employer is only mentioned in connection with the employment during any less period than twelve months. Then the schedule goes on to define "average weekly earnings" and how they are to be computed. Para. 2 (*a*) is the material provision: "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. Provided that where by reason of the shortness of the time during which the workman has been in the employment of his employer"—that probably means the same thing as the less period in the employment of the same employer referred to above—"or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration," then regard shall be had to certain considerations, which I need not particularly mention. Now the respondent was a dock labourer. His employment was casual in this sense, that he was employed by the job and not under a time contract,

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and accordingly his earnings one week might be a good deal more than his earnings in another week, but he was employed, as such labourers usually are, not only by the appellants, the London and North Eastern Railway Company, but also by other employers. For the last seven weeks preceding the accident he had worked only for the appellants, but during the twelve months preceding the accident he had been employed not only by the appellants, but also by other employers. The learned county court judge has stated that an agreed statement had been put in showing that in the last seven weeks, during which period he apparently worked for the appellants alone, he received from them altogether a sum which when divided by the number of weeks gave an average of considerably over 3*l*. He stated also that it was admitted that the sum earned during the twelve months if divided by the number of days during which he worked for the appellants, would work out at more than 3*l*. a week, though if divided by weeks it would give less than 3*l*. a week. It was also admitted that during the period that the respondent worked for other employers besides the appellants and the respondent stated in evidence that if the sums received by him from such other employers were added to the amount received by him from the appellants, his average earnings would amount to more than 3*l*. a week. The county court judge had therefore three alternatives before him, under any one of which he might find that the earnings were more than 3*l*. a week. He then refers to the contention on the part of the appellants, and says: "The solicitor for the respondents (the present appellants) contends that in order to arrive at the applicant's 'average weekly earnings' I ought to take the total amount paid by the respondents during the twelve months to" the applicant himself—I omit the reference to the other men as being immaterial—"and divide this amount by 44"—it ought to be instead of fifty-two—"ignoring the fact that during the same period the man was employed by other employers besides the respondents. I declined to accept this view." I think all he means there is that he declined to accept the view that he ought to ignore

the sums paid to the respondent during the period by other employers besides the appellants, because he says the method suggested was not the method best calculated to give the rate per week at which the respondent was being remunerated. Then he held as a fact, and as to that there is no question, that it was within his competency to hold, and I think there was evidence to support it, that he had sufficient materials to enable him to compute the average weekly earnings without having recourse to the proviso in para. 2 (*a*). In other words, he held that it was not impracticable at the date of the accident to compute the rate of remuneration. That he was quite entitled to find, and having found that he then proceeded to compute the average weekly earnings in such manner as was best calculated to give the rate per week at which the workman was being remunerated. I do not think it much matters whether he took as the method of computation the average of the seven weeks immediately preceding the accident, during which the respondent was employed exclusively by one employer—namely, the appellants—or if he took the other standard, what he was actually earning during the twelve months preceding the date of the accident, that is to say, what he was earning as a casual labourer at the docks. For myself, and speaking only for myself, I think I should be inclined to say that to take the average earnings of the seven weeks, that is to say, the shorter period referred to in para. 1 (*b*), would be the safer mode of making the computation, but in my opinion it was quite open to him to take either of the two modes I have mentioned. Having done that, having adopted what in my opinion was within his competency to adopt, the result is entirely for him. It is entirely for him to determine what is the method best calculated to give the rate per week at which the workman was being remunerated, and therefore we cannot interfere with his decision.

ATKIN L.J. I agree. The matter has arisen upon paras. 1 and 2 of Sch. I. to the Act of 1906, which have occasioned difficulty before, and will, I have no doubt, do so again,

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as to the computation of average weekly earnings. The particular difficulty here arises in the case of a man who was employed by the appellants, the London and North Eastern Railway Company. He was in fact a casual dock labourer. He sometimes worked for the appellants and sometimes for two or three other employers who had business to give to men in the capacity of the respondent. He had also been from time to time employed by the appellants over the whole of the preceding year. He had not worked every week for them, but in most of the weeks he had, on one day or another, sometimes one, sometimes two, sometimes three, sometimes four or five, or sometimes apparently six days of the week worked for them, but on each occasion the employment was the ordinary employment of a casual labourer, that is to say, it was apparently a daily job and for the particular job. There was to my mind no continuous employment of the respondent at all; he did not work under any contract of service other than a contract of service to perform the particular work for the particular day on which he was engaged. He was injured, and the question thereupon arises how his average weekly earnings are to be calculated. Upon that we were told that there was the decision of *Cue* v. *Port of London Authority* (1), which prevented the learned county court judge from taking into account any earnings other than those which he had in fact earned from the particular employers, the present appellants. I agree that there are statements in that case by some of the judges which seem to point in that direction. On the other hand there is a series of cases which appear to me to be quite inconsistent with that view. I do not propose in this case to deal with them, because it is not necessary from the view I take in the present case to discuss how far we are bound by that rigid view of *Cue* v. *Port of London Authority*. (1) It is I think sufficient to refer to two cases. One of these is *Barnett* v. *Port of London Authority* (2), which was the case of a casual dock labourer, in which it appears to me quite plain that the Court of Appeal

(1) [1914] 3 K. B. 892. (2) [1913] 2 K. B. 115.

took into account and said there ought to have been taken into account in computing the workman's average weekly earnings not merely what he had earned from the Port of London Authority, but also what he was in fact able to earn as a dock labourer from other employers, so as to make his weekly earnings something greater than the weekly earnings which he received merely from the Port of London Authority. The other case is *Thomson & Co.* v. *Mackay* (1), in which it seems to me also quite plain both the Court of Appeal and the House of Lords regarded the employment of a casual workman, though he would probably not like to be called a casual workman, a pilot at Barry receiving employment from the owners of different ships from day to day or even hour to hour, as being an employment in which it was right to compute the whole of the earnings made by the man in respect of his earnings from all his employers, and not merely from the particular employer who was the respondent. In that case the respondent happened to be the owner of a ship in respect of which the applicant had never before acted for those owners at all except on the one particular occasion on which he had earned 6*l.*, and would be himself only entitled, I think, to 3*l.* Those cases seem to me to throw doubt upon the proposition which it was suggested was established by *Cue* v. *Port of London Authority* (2), and all I need say is that when that case arises for consideration I think it will have to be carefully considered in the light of the other cases, and especially of the case in the House of Lords to which I have referred of *Thomson & Co.* v. *Mackay*. (1) In the present case I think it is sufficient to say that, where the labour is casual the county court judge is not bound to have recourse to the proviso in para. 2 (*a*) of Sch. I., and in this case the county court judge did not do so. He had, in the words of the Act, to compute the average weekly earnings "in such manner as is best calculated to give the rate per week at which the workman was being remunerated." He had evidence of continuous employment, I suppose casual employment, because the judge has so held,

(1) 14 B. W. C. C. 143; [1921] W. N. 230.
(2) [1914] 3 K. B. 892.

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therefore continuous casual employment of this man for a period of seven weeks. Dealing with that he came to the conclusion for those seven weeks the average would be something like 3*l.* 17*s.* a week. He looked back, and he did not accept that as being the final test, and Mr. Shakespeare says he ought clearly to have had regard to the fact that such trade as this is partly seasonal trade or is at any rate a trade where business and employment fluctuate and where regular and consistent employment day by day and week by week is not necessarily obtained. Of course that is absolutely right, and there was evidence to that effect I think in this particular case; but the learned judge seems to me to have taken that into account in his judgment, and he says in effect: "I shall not take the wages at 3*l.* 17*s.*, but looking at the whole of the evidence I think there is evidence from this continuous employment which justifies me at any rate in finding that the average earnings of this man were at any rate 3*l.* a week," which is all that is necessary for the purpose of giving the award that he in fact gave. I think there was evidence, and if there was any evidence at all then it appears to me plain that the learned judge's decision that it was practicable to compute the average weekly earnings on the evidence that he had as to the particular employment is a decision on a question of fact. It is so stated again in *Godden* v. *W. Cowlin & Son* (1), where Buckley L.J. says: "He [the learned county court judge] found it practicable to compute the rate of remuneration fairly notwithstanding the comparative shortness of time. Whether it was practicable or not was a question of fact, and he held that it was practicable," and that view was concurred in by Hamilton L.J. and also, I think, by Cozens-Hardy M.R. Therefore it appears to me that there was a question of fact in this case to be determined by the county court judge upon evidence upon which he could determine it, and as it is not shown that he in fact refused to take into account matters which he ought to have taken into account—namely, the fact that the employment might be treated from time to time

1) [1913] 1 K. B. 590, 594.

as being intermittent in the sense that it was not continuous —I think it is impossible for us to interfere with the learned judge's finding, and therefore this appeal must be dismissed.

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Appeal dismissed.

Solicitor for appellants: *Thomas Chew.*

Solicitors for respondent: *Isadore Goldman & Son, for R. R. Crute & Son, Sunderland.*

W. I. C.

[IN THE COURT OF APPEAL.]

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FENTON *v.* OWNERS OF SHIP KELVIN.

Workmen's Compensation—Compensation—Notice of Accident—Latent Injury—Exposure to Wet and Cold in Shipwreck—Supervening Disease—Connection between Shipwreck and Disease not appreciated by Workman—Delay in giving Notice of Accident—"Mistake or other reasonable cause"—"Knowledge of the accident"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-s.* 1 (*a*)—*Workmen's Compensation Act*, 1923 (13 & 14 *Geo.* 5, *c.* 42), *s.* 10, *sub-s.* 2.

On February 6, 1924, the applicant, who was one of the crew of a steam trawler, was wrecked off the coast of Iceland. He was exposed to the weather in a leaky boat and remained in his wet clothes for some days, being unable to obtain a change of clothing until February 10. For some time after this the applicant felt a certain amount of "shakiness," but no other ill effects from the shipwreck, and he subsequently went on two other voyages to Iceland in another of the respondents' trawlers. On his return he felt ill, and found he was afflicted with bladder trouble. He saw a doctor, but was not physically tested or examined by him. He subsequently went for three other voyages, each lasting for about three weeks, and suffered from the same symptoms. On June 12, 1924, he again saw his doctor, who informed him that he was in a very serious condition and ought not to go to sea again. In October he commenced arbitration proceedings, claiming compensation on the ground that he was totally incapacitated by chronic gastritis and hæmaturia occasioned by the exposure to which he had been subjected to in the shipwreck. He alleged that he had given verbal notice of the accident to the employers on August 1. The employers denied liability on the grounds that the incapacity was not due to the shipwreck and that they had not received notice of the accident as soon as practicable after the happening thereof and were prejudiced in their defence by the want of such notice. The

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county court judge found that the events in Iceland constituted an "accident"; that the disease from which the applicant was suffering on June 12 and subsequently was the consequential result of the accident; that the claim for compensation was made within six months; that the notice was not given as soon as practicable; and that the employers were in fact prejudiced by the delay in giving notice. He held, however, that the applicant was not bound to give notice until he realized the connection of his illness with the accident and the possibility of a claim for compensation, and that looking at all the facts of the case, and particularly having regard to the extreme medical obscurity of the particular case, there was reasonable excuse for the applicant's delay in giving notice:—

Held, that there was evidence before the county court judge on which he could find that it was not until the end of July when the applicant communicated with the employers that he realized the connection of cause and effect between the accident and the incapacity from which he was suffering, and that there was reasonable cause for the delay in giving notice until that time.

Views of Fletcher Moulton L.J. in *Egerton* v. *Moore* [1912] 2 K. B. 308, 315 and of Lord Dunedin in *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (1912) 6 B. W. C. C. 308, 315, 317 adopted.

Quaere, whether the words "knowledge of the accident" in sub-s. 2 of s. 10 of the Workmen's Compensation Act, 1923, mean knowledge of the actual occurrence of the accident or knowledge of the accident occasioning injury to a particular workman.

APPEAL from an award of the judge of the Kingston-upon-Hull County Court, sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The facts as found by the county court judge were as follows:—

The applicant Fenton was a marine engineer who had entered the employment of the respondents in 1898 and had remained in the same employment, save for an occasional break, until June 12, 1924. On February 6, 1924, he was one of the crew of the steam trawler *Kelvin*, which went ashore on the rocks off the coast of Iceland. The vessel became a total wreck, and the crew had to take to the boats without any opportunity of getting into warm clothes. It was very cold and wet, and the men were exposed to the weather in a leaky boat for one and a half hours and got wet through. They were then picked up by a motor boat and taken to a hospital, where there was no adequate accommodation. It was not until February 10 that they

could obtain a change of clothes. On February 14 the crew left for Leith. For some time after this the applicant felt a certain amount of "shakiness," but no other ill effects from the shipwreck, and he subsequently went on two voyages to Iceland in the respondents' trawler *Marconi*. On his return he felt ill, and found that he was affected with bladder trouble. He saw a doctor, but was not physically tested or examined by him, but was given two bottles of medicine to take. After this he went for three other voyages, each lasting for about three weeks, and suffered from the same symptoms. On June 12, 1924, he saw Dr. Barker, who took a sample of his water for the first time, and ascertained that he was suffering from cystitis, and was in a very serious condition and ought not to go to sea again. He told him to go home and stay in bed. In October he commenced arbitration proceedings, claiming compensation on the ground that he was totally incapacitated by chronic gastritis and hæmaturia, and that the same were due to the exposure to which he had been subjected in the shipwreck. He alleged that he had given verbal notice of the accident to the employers on August 1. The employers denied liability on the grounds that the incapacity was not due to the shipwreck, and that they had not received notice of the accident as soon as practicable after the happening thereof, and were prejudiced in their defence by the want of such notice. At the hearing medical and other evidence was given at great length and judgment was reserved.

In delivering his considered judgment the county court judge said that the case had caused him great anxiety, but that he had come to the conclusion that the applicant was entitled to compensation. He found upon the evidence that the events in Iceland constituted an "accident" within the meaning of the Act of 1906, following the definition of Lord Shaw in *Glasgow Coal Co.* v. *Welsh* (1), and that the disease from which the applicant was suffering on June 12 and since then was the consequential result of the accident.

(1) [1916] 2 A. C. 1, 10.

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He also found that the claim for compensation was made within six months of the accident, that notice was not given as soon as practicable, and that the employers were in fact prejudiced by the delay in giving notice. The applicant had therefore to bring himself within the proviso to sub-s. 1 of s. 2 of the Act of 1906 as to mistake or other reasonable cause or he would fail. On June 12 he was warned that he would kill himself if he went to sea, yet he gave no notice until the end of July. The county court judge concluded his judgment as follows: "The question I have to decide, and it is a difficult one, is whether there was anything which comes under the heading of mistake or reasonable cause, excusing this delay. It is clear that the employers knew all about the shipwreck, and they knew that the applicant was not fit to go to sea, but the fact remains that he never mentioned these two matters in connection with the Act to his employers until the end of July. Now the result of the cases seems to be that a man cannot be expected to give notice until he realizes that his condition is due to injury by accident entitling him to compensation under the Act. That is to say, until the inter-connection of the cause, the effect, and the possibility of the claim are presented to his mind, time does not begin to run against him. I agree that ignorance of the law or of the existence of the Acts do not help him, but I think that he is entitled to a true appreciation of the facts, which create the connection between the cause, the effect, and the possibility of a claim before time begins to run against him. Now looking at all the facts of this case, and particularly, but by no means exclusively, to the extreme medical obscurity between the cause and effect in this case, and the serious divergence of opinion expressed before me by the eminent men who have appeared in Court, I have come to the conclusion, though not without doubt, that it is my duty to find, and I do find, that there was reasonable cause for the applicant's delay in giving notice of the accident as soon as practicable or that such delay was due to mistake. It follows that the applicant is entitled to compensation. In view of the greater part of the medical evidence, I hold that

the applicant is and has been totally incapacitated since June 12, 1924."

The employers appealed. The appeal was heard on June 12, 15, 16, 1925.

Doughty K.C. and *Hugh Beazley* for the appellants. It is submitted that although there was an accident there is no evidence of injury caused by the accident. It is alleged that the inflammation of the bladder, from which the respondent suffered, was caused by the exposure from the wreck, and the county court judge has so found. It is submitted however that there was no evidence of this. The dates are inconsistent with the exposure being the cause. There were no signs of incapacity till two months after the wreck.

[WARRINGTON L.J. It is a pure question of fact.]

That is so, no doubt, but there must be some evidence to support the county court judge's finding, and here, it is submitted, there was none. As to fixing the date of the accident, see *Innes or Grant* v. *Kynoch.* (1)

Assuming however that the respondent's condition is the result of the accident the appellants were prejudiced by the delay of the respondent in giving notice of the accident, as the county court judge has found. The obligation to give notice did not arise till June 12, when the respondent was told by Dr. Barker that he was in a very serious condition and ought not to go to sea again. It was then his duty to give notice of the accident to the appellants, but he did not do so until the end of July or the beginning of August. There was no "reasonable cause" within the proviso to sub-s. 1 of s. 2 of the Act of 1906 for his not giving notice on June 12 or as soon as practicable afterwards. "Reasonable cause" is a question of law: *Hillman* v. *London, Brighton and South Coast Ry.* (2)

[ATKIN L.J. referred to *King* v. *Port of London Authority* (3).]

As soon as a workman associates in his mind the cause and effect of the accident it is his duty to give notice.

(1) [1919] A. C. 765. (2) (1919) 12 B. W. C. C. 323.
(3) [1920] A. C. 1.

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[They also referred to *Fenton* v. *Thorley & Co.* (1); *Hoare* v. *Arding & Hobbs* (2); *Webster* v. *Cohen Brothers.* (3)]

Neilson K.C. and *Waldo Briggs* for the respondent were called upon only as to the question of notice. The respondent did not appreciate the connection between his condition and the shipwreck until July, and until he did so the obligation to give notice did not arise. The only reason for barring a claim is that the employers have been prejudiced by the delay. Here the finding is that the employers were prejudiced up to June 12. There is no finding that they were prejudiced after that date. That they were not prejudiced is shown by the conduct of the employers. When they received the notice they waited until July 15 before sending the workman to the doctor. The Court, it is submitted, should follow as a guide *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (4), where it was held that as the delay in giving notice and claiming compensation in that case was due to the workman's ignorance of the serious nature of his injury, it was occasioned by "mistake or other reasonable cause," within s. 2, sub-s. 1, of the Act of 1906, and so was not a bar to the maintenance of proceedings for compensation. If however the Court is not prepared to find there was no prejudice after June 12, it is suggested that the case should be sent back to the county court judge to find up to what date the prejudice extended.

Doughty K.C. in reply. In *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (4) the workman was misled by the medical diagnosis, and therefore had an excellent excuse for not giving notice. There was clear evidence there that the man was misled. Here there was no mistake in the sense there was in that case.

POLLOCK M.R. This appeal must be dismissed. It is an appeal from a decision of the county court judge awarding compensation to the workman Fenton as against the owners of the ship *Kelvin*. It appears that Fenton is a marine engineer, and entered the employment of the respondents in

(1) [1903] A. C. 443, 448.
(2) (1911) 5 B. W. C. C. 36.
(3) (1913) 6 B. W. C. C. 92.
(4) 6 B. W. C. C. 308.

1898 and remained in such employment, save for an occasional break, until June 12, 1924, and he and his employers had been on good terms. Both trusted each other. The workman was confident that the employers would do their best by him, and the employers valued him as a man capable and constant in the service he rendered to them. On February 6, 1924, while Fenton was employed on the *Kelvin*, the ship ran ashore on some rocks off the Western Islands, which lie off the coast of Iceland, and became a total wreck, with the consequence that the crew, of whom Fenton was one, suffered considerably from exposure. Ultimately they were taken to what was called a hospital, but was not more than a shelter, which was some miles away. They remained in their wet clothes for several days, and it was not until some days had elapsed that they were enabled to be reclothed and to start on the homeward voyage to Leith. I need not go further through the facts, because we have the advantage of a lucid and careful judgment given by the county court judge, which recites them fully.

The claim is made by the workman on the ground that he has suffered from incapacity due to the accident of the vessel going ashore with the supervening exposure which he suffered in consequence of the accident. Now the first point taken was that there was no evidence of incapacity arising from this injury caused by the accident. The facts are fully summarized by the county court judge, and we have come to the conclusion that there clearly was evidence on which he might come to the conclusion to which he did on the point. That being so, the workman's right to compensation is not complete unless and until he fulfils the conditions which are laid down by s. 2 of the Act of 1906. These conditions are that he must make the claim for compensation within six months from the occurrence of the accident causing the injury, and he must give notice of the accident as soon as practicable after the happening thereof. I put those conditions in the reverse order to that in which they are contained in sub-s. 1 of s. 2, because the learned county court judge has held that with regard to the claim, which must be made within six months, and which is a defined and fixed period, the claim

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was in fact made within the six months, inasmuch as it was made at the end of July or the first day of August, 1924. As the accident happened on February 6, 1924, the claim was made within the time limited. But still the workman is under an obligation to fulfil the other condition imposed by s. 2, sub-s. 1, of the Act of 1906—namely, he must give notice of the accident as soon as practicable after the happening thereof. The county court judge has found that he did not give notice as soon as practicable. The finding on that is clear. "The applicant did not give notice as soon as practicable, and therefore he must fail, unless he can bring himself within the purview of para. (*a*) of the proviso to sub-s. 1 of s. 2 of the Act of 1906." More than that, the learned county court judge has found that the employers were in fact prejudiced by the fact that notice was not given as soon as practicable. Under these circumstances, the proviso only excuses the workman from compliance with this condition if he can show that such want of notice was occasioned by mistake or other reasonable cause. The learned county court judge has found a difficulty on this point, and speaking for myself I have also found a difficulty.

The relevant facts relating to this question of reasonable cause are these. The workman suffered from a disease of the urinary organs, which supervened in consequence of the exposure due to the shipwreck, but which took some time to develop and to ripen into the condition in which he was found to be on June 12. He had, after his return to this country, made as many as five somewhat short voyages in another vessel belonging to the same employers, but he had been suffering increasingly from trouble in his bladder, and he had stuck to his work, partly in the belief that he would get better. At any rate, it was not until June 12 that Dr. Barker was able to get a specimen of his urine. Dr. Barker then found that Fenton's condition was undoubtedly serious, and he told him that it was madness for him to go to sea again. He needed to be treated, and indeed to be treated in that best of all restoratives, a warm dry bed. The probability was that he would completely recover, but

the liability to a recurrence of the disease in case of further exposure would remain. However, it is clear that on June 12 the workman realized that he was seriously incapacitated. I will not go through the evidence, admirably summarized by the learned county court judge, as to what took place between the workman and his employers. There were a number of interviews and certain incidents which showed that the employers themselves had become conscious that the man could not go to sea in consequence of the illness from which he was suffering. But on neither side was it definitely realized that the illness from which the man was suffering, and which was diagnosed on June 12, was in consequence of the wreck of the *Kelvin* on February 6.

It is said with great force by Mr. Doughty, on behalf of the employers, that inasmuch as the serious condition of the workman was appreciated on June 12, the duty to give notice immediately arose, and that it was not given then or as soon as practicable afterwards, and that there was no reasonable cause for not giving the notice, inasmuch as the workman himself appreciated at the time that his condition was serious and likely to lay him up for some time.

Efforts have been made from time to time to give some sort of indication of what is "reasonable cause." It is impossible, of course, to give an inclusive definition of it, but in *Webster* v. *Cohen Brothers* (1), to which our attention has been drawn, Buckley L.J. says: "We must distinguish between two different sets of facts: in the one the workman says, 'If things continue as they are, I shall never require to give notice of any claim for compensation'; that might be reasonable cause for not giving notice. The other state of facts is this; the workman says to himself, 'I have had an accident, the results of which are serious, but I think they will alter for the better. I shall not give my employer notice of the accident, because if, as I hope, the results alter for the better, I shall never have to give notice of a claim for compensation at all.' That is not reasonable cause for the failure to give notice of the accident."

(1) 6 B. W. C. C. 92, 97.

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As always, one must deal with observations made by a learned judge in relation to the facts which gave rise to them, but I find myself some little difficulty in appreciating the line of demarcation between those two contrasted statements. It appears to me that they shade so closely one into the other that it would be very difficult indeed in many cases to say whether, applying that test, the notice ought to have been given or there was reasonable cause for not giving it. But it has to be remembered that in that case there was a definite physical or, I might say, a mechanical injury to the man, of which he was conscious. He had fallen from steps, his right knee was twisted under him. He actually injured his right knee, and from the time of the accident was in great pain. Buckley L.J. proceeds to give a summary of a number of cases in which this problem has been dealt with, and he says (1): "To summarise the cases cited in favour of the workman, six out of the seven are cases of latent injury." It would appear, therefore, that although the problem may be solved more easily where there is a mechanical and patent injury, the excuse of a workman's failure to give notice is more easy where the injury is latent. He refers to *Hoare* v. *Arding & Hobbs* (2), where he says "it was impossible to say whether the result would be a temporary matter which would disappear, or whether it would be lasting. It turned out to be a serious affection of the nervous system. There was no reason to suspect that at the time. Delay in giving notice was held due to reasonable cause." I am not going through the other cases to which Buckley L.J. refers, but they do seem to indicate that where there is uncertainty and the injury is one which is latent, difficult of diagnosis and perhaps difficult of prognosis, you may readily find that there was reasonable cause for not giving notice.

Now, the facts of the present case show this, that it does not appear that Fenton was told on June 12 that there was a necessary inter-connection between the illness from which he was suffering and the shipwreck. That apparently was

(1) 6 B. W. C. C. 92, 98. (2) 5 B. W. C. C. 36.

revealed to the minds both of Dr. Barker and of the man in the course of the supervening six or eight weeks, which brought them to the end of July. The learned county court judge, applying his mind to the facts which were before him, came to this conclusion: "I think that he is entitled to a true appreciation of the facts which create the connection between the cause, the effect, and the possibility of a claim before time begins to run against him." And looking at all the facts of the case he says: "I have come to the conclusion, though not without doubt, that it is my duty to find, and I do find, that there was reasonable cause for the applicant's delay in giving notice of the accident as soon as practicable or that such delay was due to mistake." It appears to me that there was such evidence before the learned county court judge as would enable him to come to that conclusion. A belief that the injury is trivial is a good excuse for not giving notice. The cases supporting that are to be found in Willis's Workmen's Compensation, 23rd ed., p. 122. If we start with this fact, and take the other cases, such as *Egerton* v. *Moore* (1) or *Webster* v. *Cohen Brothers* (2), I think it is plain there may be a number of gradations, questions of degree, as to whether or not the workman was apprised so clearly of his condition, its origin and its future, as to compel him or throw upon him the duty of giving notice. When, however, the true measure of the situation is only arrived at by lapse of time and by the confidence in the diagnosis which arises from the progress of the disease, particularly where the injury is what may be called latent, then I think that the workman is more readily excused. But the measure of these degrees, the estimate of these gradations are questions of fact which are for the learned county court judge. It appears to me that in this case the learned county court judge had materials before him on which he could estimate, and did estimate, in accordance with the cases cited and summarized by Buckley L.J., and he has come to a conclusion which he might legitimately come to, and we ought not to interfere.

I have not dealt with s. 10 of the Act of 1923. It appears

(1) [1912] 2 K. B. 308. (2) 6 B. W. C. C. 92.

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to me unnecessary to put our decision on any interpretation of that section. I therefore merely refer to it, not for the purpose of giving any decision on it, but because it has been referred to at the Bar and was referred to before the learned county court judge. It is plain that that section has made considerable inroads on the stringency of the notice required to be given in s. 2 of the Act of 1906. In the case where the employer is proved to have had knowledge of the accident, from any source, at or about the time of the accident, any defect or inaccuracy in the notice is no bar to the maintenance of proceedings. It is plain that there will be some difficult questions arising as to the construction of actual words of s. 10 and the meaning of the word "accident" in that section. I merely call attention to that in order to show that I have not overlooked the fact that s. 10 may possibly provide an easier solution for the case. But the learned county court judge, I think wisely, came to the conclusion that there were the materials before him on which he could estimate what was the duty of the workman on and after June 12 up to the time when notice was in fact given. He came to the conclusion, on the consideration of all the circumstances of the case, that there was reasonable cause for the workman having failed at an earlier date than he did to give notice. I think he was right in saying there was evidence before him, and there being evidence before him, his judgment on this difficult point must in my opinion stand. For these reasons, therefore, I think the appeal fails and must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The case is curious and in one respect difficult. Two questions arise, first, whether the learned county court judge was justified in finding that the man had suffered injury by accident, and, secondly, whether there being assumed to be, and held by the learned county court judge to be, delay in giving notice of the accident, there was reasonable cause for that delay.

The workman was an engineer on a steam trawler employed in fishing off the coast of Iceland. On February 6, 1924, the ship was cast on the rocks off the coast of Iceland, and

became a total wreck, and as a consequence of the wreck the crew, including the workman, had to take to the boats, and they were exposed to extreme cold and extreme wet. They were ultimately picked up, and were taken to a local hospital on one of the islands, where there were no proper means either of treating them or providing them with dry clothes, or keeping them warm, and they remained in their wet clothes for two or three days, until the skipper succeeded in obtaining from somewhere dry clothes for them.

Now the accident was, I think, the wreck of the ship. From that wreck, as one of the consequences, came the exposure to wet and cold, and the workman says that to himself another consequence was that he suffered severely from inflammation of the bladder, by which ultimately on June 12 he was found to be incapacitated for work. The learned county court judge has held that that incapacity for work was the result of the disease, and that the disease was the result of the accident. In other words, to use the words of the statute, the man has suffered injury by accident arising out of and in the course of his employment, and is thereby incapacitated from following his employment.

I need not go through the facts; they are stated quite clearly by the learned county court judge. In my opinion there was ample evidence connecting the man's condition, as it was when he was finally found to be incapacitated for work, with the accident which happened on February 6, 1924. I say nothing more about that. On that point I think there was ample evidence, and on that point the appeal fails.

There then arises the second question. The man did not give notice of the accident until the end of July or the beginning of August. The learned county court judge has found that the man has not established that the employers were not prejudiced by that delay. In these circumstances the question arose, whether the delay was excused by reason of "mistake, absence from the United Kingdom, or other reasonable cause." The learned county court judge has found that there was a reasonable cause, and he has found it for this

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reason, that although the man knew, of course, the facts leading up to his incapacity, he did not until the end of July realize the inter-connection of cause and effect between what he had suffered after the shipwreck and his condition of incapacity discovered to exist on June 12. The county court judge has also held, that inasmuch as the man did not realize the inter-connection of cause and effect until the end of July, and when he did realize it gave notice to his employers, that delay in giving notice before that date was occasioned by reasonable cause. In my opinion, the learned county court judge was right in law in holding that the important question in such a case as the present is: at what time did the workman realize that he had suffered an injury by accident entitling him to compensation under the Act? The judge has not quite put it in these terms. He has put it rather: at what time did he realize the inter-connection of cause and effect? But it comes to the same thing. At what time did he realize that he had suffered that which entitled him to compensation for injury by accident? That that is the important time to consider is, I think, shown first by expressions in the judgment of Fletcher Moulton L.J. in *Egerton* v. *Moore* (1), where the learned Lord Justice says: "In my opinion, it is clear that the workman as early as February, if not before, knew that he was suffering from something which he might have to claim to be a consequence of the accident. It was his business then, at once, to give notice." That seems to me to be founded on the same view of the position of the workman as that which I have already expressed and which the learned county court judge also expressed. The same view, I think, is to be found in the judgment of Lord Dunedin, when Lord President of the Court of Session, in Scotland, in *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (2), where he says (3): "Not only did the man himself not think at the time that he was much injured, but on going to the doctor for skilled advice he is told, 'You are suffering from muscular rheumatism.' Well, muscular rheumatism may sometimes be

(1) [1912] 2 K. B. 308, 315. (2) 6 B. W. C. C. 308.
(3) Ibid. 317.

occasioned by an accident. In the strict sense of the word it is not caused, because a blow cannot directly occasion rheumatism." Then, a little further on, after quoting another passage from the judgment of Fletcher Moulton L.J. in *Egerton* v. *Moore* (1), he says: "This workman is told by his doctor: 'You have only got muscular rheumatism, and that is a thing which will pass off.' He does not think it is anything very serious, he does not make a claim, and he goes on in that state of ignorance until nearly the end of December, when he gets much worse, and then he goes to another doctor, who makes, I suppose, a more careful examination and finds out that he has sustained a very serious injury. I agree that after that the man might have given notice." That is to say, the important point is: when did the man find out that he had suffered injury by accident, which gives rise to a claim for compensation? I think that is clearly the effect of the judgment of Lord Dunedin in that case.

Now, on the facts in the present case, there was, in my opinion, ample evidence to support the conclusion of the learned county court judge, that it was not until the end of July when the workman communicated with the employers that he did realize the inter-connection of cause and effect between the accident and the incapacity from which he was then suffering. Of course he knew the facts. That is to say, he knew that he had been exposed to extreme cold and wet, and he knew that some considerable number of weeks after that exposure he had been suffering from an affection of the bladder. He also knew that that affection of the bladder had become so serious in June that the doctor would not allow him to go to sea again. But in the interval he had been able to go to sea several times. Even in June the doctor had not told him—I do not know whether he had formed any definite opinion himself on the subject—but at any rate he had not told the workman that the affection of the bladder was the result of and was caused by the extreme exposure to which he had been subjected. It was not until

(1) [1912] 2 K. B. 308, 314.

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the end of July that the workman realised the inter-connection of cause and effect between these two matters. I am therefore of opinion that the learned county court judge was justified both in law and in fact in coming to the conclusion that there was reasonable cause for the absence of notice until the end of July.

Logically it seems to me that the view I have expressed goes further than merely reasonable cause, and that it is only when the workman realizes the connection between his condition and the accident, that in such cases as this, the necessity for giving the notice of injury arises at all, because it is not until he realizes that, that it becomes practicable to give a notice. A man does not give a notice in anticipation. It is notice of injury that is required, and I think that is implied, if not expressed, in the passage from the judgment of Fletcher Moulton L.J. in *Egerton* v. *Moore* (1) which I have just read, where having stated that it was clear that the workman knew as early as February, if not before, "that he was suffering from something which he might have to claim to be a consequence of the accident." The learned Lord Justice says: "It was his business then, at once, to give notice." He seems to have been clearly of opinion that it was not until that happened that the necessity for the notice arose at all. However, it is unnecessary to go further into that view of the matter. On the present appeal there is no necessity for saying more than that he had at least reasonable cause for not giving the notice before that.

With regard to s. 10 of the Act of 1923, the construction of that section was not dealt with by the learned county court judge, and it is unnecessary for us to discuss it. I desire to leave that question entirely open, only saying this, that it will, I am satisfied, give rise to very serious questions, and in many cases may be held to relieve the workman from giving notice of injury at all. But, as I say, the effect of the section does not require discussion in the present case,

(1) (1912) 2 K. B. 308, 314

and I wish to leave the matter entirely open. The result is, in my opinion, that the appeal fails, and must be dismissed with costs.

ATKIN L.J. This seems to me to have been a difficult case for any judge to decide, and speaking for myself it appears to me that the trial was a very satisfactory and careful one, and that the learned county court judge has here arrived at a correct conclusion after having obviously exercised great care in coming to his decision. He appears to have been assisted in the Court below by an excellent argument by the two practitioners who appeared before him, and we have had here the assistance of an admirable argument by Mr. Doughty and, to the extent to which he was called upon, by Mr. Neilson.

On the first question which, I suppose, is the main question, whether the learned county court judge was justified in finding that the injury in this case was an injury arising from an accident arising out of and in the course of the employment, I do not wish to add anything to what has been said by the other members of the Court. It appears to me that there was evidence here on which the learned county court judge could find that this illness from which the man was suffering—namely, inflammation of the bladder—was in fact an injury arising out of an accident or an injury by accident. There are, and always have been, difficulties in ascertaining precisely the views taken by the different Courts as to the meaning of "accident"; and I think it is quite open for argument in this case whether the accident was the stranding of the ship or whether the accident was the exposure following the stranding, or whether it was both. My own view would be that the accident was the stranding, that the exposure was a necessary consequence of the accident, and that the illness was a necessary consequence of the exposure, so that the illness in that sense was the direct consequence of the accident. But whatever view is taken, it appears to me there was evidence on which the learned county court judge could find the principal fact in favour of the workman.

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The other question which arises is whether the learned judge was right in finding that there was reasonable cause for not giving notice earlier than it was given. To my mind there was evidence on which he could so find. I do not think that is quite conclusive, because what is or is not reasonable cause is plainly, I think, on the authorities a question of law. But having determined the question of law whether a cause could exist which might be a reasonable cause, then obviously it is for the county court judge to find on the facts whether they bring the case within that reasonable cause. The cause suggested here is that it was not until about the time when the workman gave notice that he reasonably came to the conclusion that his injury was caused by the accident, and it appears to me that that would be reasonable cause for not giving notice earlier. It is to my mind a moot point as to whether, under these circumstances, the correct view is that it was not practicable to give notice until the man had reasonably come to the conclusion that his injury was caused by the accident or whether the right way of putting it is that there was reasonable cause for not giving notice at the earliest date at which it was practicable. I for my part see a difficulty in saying that it is practicable for a man to give notice of an accident before he knows that he is injured by the accident. From that point of view it would not be necessary to plead excuse. However, it has been put here as excuse on the ground of reasonable cause, and I will deal with it on that footing.

I think the authorities clearly show, and indeed I should have thought that authority was not necessary, that you may and ought to take into account the period of time after the workman first becomes reasonably aware that an injury from which he is suffering was in fact caused by accident in the course of his employment. *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (1) is, I think, a good instance of the kind of case which illustrates this point. In that case Lord Dunedin (then Lord President) says (2): "Now, the result of the cases which I have mentioned, other than *Egerton*

(1) 6 B. W. C. C. 308. (2) 6 B. W. C. C. 317.

v. *Moore* (1), seems to me to affirm this proposition perfectly clearly—that if a man has had an accident, and honestly believes at the time that nothing serious has happened to him, and therefore, not conceiving that he has a good claim against his employer, makes no claim, but it afterwards turns out that he had made a mistake in fact and really had been injured, that may be—I do not say must always be, because the question of time might enter into it—reasonable cause for his not making the claim within the six months, or not giving notice of the accident before he left the employment." Now the circumstances of that case were that the man obviously was injured, though he thought he had only strained his back. For two months the doctor said he was suffering from muscular rheumatism, and I think it is plain that when the Lord President says (2) " has an accident, and honestly believes at the time that nothing serious has happened to him," he means " has an accident and honestly believes at the time that nothing serious has happened to him as the result of that accident." That case and the judgment of Fletcher Moulton L.J. in *Egerton* v. *Moore* (1), referred to by the learned Lord President, seem to me ample authority for the proposition I have suggested, and show that there was reasonable cause in this case for the delay in giving notice ; and I think the learned county court judge's findings of fact indicate that he was right in coming to the conclusion that the delay was excused.

For these reasons it becomes unnecessary to deal with the further point that arises on s. 10, sub-s. 2, of the Act of 1923. It will be remembered that by s. 1, sub-s. 1, of the Act of 1906, which is the principal Act, the workman is entitled to compensation where " personal injury by accident arising out of and in course of the employment is caused " to him, and that by s. 2, sub-s. 1 : " Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof." Sub-sect. 2 of s. 10 of the Act of 1923 provides that : " The want of, or

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any defect or inaccuracy in, the notice of an accident required by s. 2 of the principal Act shall not be a bar to the maintenance of proceedings for the recovery of compensation under the principal Act if the employer is proved to have had knowledge of the accident from any source at or about the time of the accident; or, where the employer is the owner of a mine or quarry or the occupier of a factory or workshop . . . . (*b*) if the accident has been reported by or on behalf of the employer to an inspector of mines or factories." There the question arises whether the words, "knowledge of the accident" in that section mean knowledge of an injury caused by accident, or whether they mean knowledge of the accident which the workman afterwards says caused the injury. I agree with what was said by Lord Dunedin in *Ellis* v. *Fairfield Shipbuilding and Engineering Co.* (1), that you "are not to measure this question of notice in very nice scales," and I should have thought that you are not to give a wide and unnecessary extension to the word "accident," which might defeat the claim to compensation. I see no reason why the words should be construed more widely than the sense they will reasonably bear. I do not propose to decide this point, but I call attention to the fact that the words of the proviso, that "If the accident has been reported by or on behalf of the employer to an inspector of mines or factories," may be used to indicate that all that is meant is the actual occurrence of the accident, and not the injury to the particular workman, because such an accident has to be reported if it causes injury to any workman. If the accident injures workman A. it would have to be reported. There is nothing in the Act which says that the report must also contain mention of the fact that it has injured workman B. Therefore the question of injury to a particular workman seems to be irrelevant and to excuse notice. That is only one of the matters which have to be taken into account. As my brothers have done, I reserve that point, because the matter may have to be argued at some future time—indeed, I should not be surprised if it has to be argued at some time

(1) 6 B. W. C. C. 308, 318.

in the near future. It is sufficient in this case to say that on the ground taken by the learned county court judge his decision cannot be disturbed, and therefore this appeal must be dismissed with costs.

Appeal dismissed.

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Solicitors for appellants: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for respondent: *Peacock & Goddard, for Benno Pearlman, Hull.*

W. I. C.

[IN THE COURT OF APPEAL.]

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HUNTER *v.* STÄDTISCHE HOCHSEEFISCHEREI GEMEINNÜTZIGE GESELLSCHAFT.

Workmen's Compensation—Compensation—Foreign Employer resident Abroad —County Court—Jurisdiction—Arbitration Proceedings—Service out of Jurisdiction by Registered Post of Copies of Application and Notices— Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2, *sub-ss.* 3, 4— *Workmen's Compensation Rules,* 1913 *to* 1924, *rr.* 15, 16.

The respondents were a company registered under the laws of Germany, and were now in liquidation in Germany. The applicant was employed by the respondents as a coal trimmer on board the steamship *Königsberg* when lying at Tyne Dock, South Shields, and on February 15, 1922, while erecting some staging he fell into a bunker hatchway and injured his knee. In his application for arbitration under the Workmen's Compensation Acts, 1906 to 1923, he stated that he was totally incapacitated by the accident from February 15 until June 7, 1922; that the respondents admitted liability and paid him compensation at the full rate based upon total incapacity until the latter date, and he claimed similar compensation based again on total incapacity from May 16, 1924, to the present time. He gave the address of the liquidator in Bremerhaven for service of the copy of his application and notices in accordance with rr. 15 and 16 of the Workmen's Compensation Rules, which in fact was effected under r. 16, sub-r. 3, by registered post. Pursuant to r. 18 the respondents filed an answer denying liability on various grounds; that the applicant was not employed by them; that compensation had been paid and the claim satisfied; that the applicant had recovered from his injuries due to the accident; and that his injuries were due to his serious and wilful misconduct. In conclusion, they submitted that the Court had no jurisdiction to hear the claim for arbitration on the ground that

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the respondents were not within the jurisdiction of the Court. The last point was argued at the hearing as a preliminary point, when the county court judge dismissed the application on the ground that the Court had no jurisdiction to deal with the matter.

On appeal:—

Held, that the Workmen's Compensation Acts applied to a foreigner resident abroad who employed a workman under conditions in which if resident in this country he would have been liable to pay compensation in pursuance of the Acts.

Held, also, that under s. 2, sub-ss. 3, 4, of the Act of 1906 and r. 16 of the Rules thereunder, service of copies of the application of arbitration and notice of hearing could properly be effected on the respondents by registered post.

Held, therefore, that the county court judge had jurisdiction to hear the application, and that the case must be remitted to him to deal with on the merits.

APPEAL from a decision of the judge of the South Shields County Court sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The respondents were a company registered under the laws of Germany and now in liquidation—Hans Bosch of Bremerhaven in Germany being the liquidator.

The appellant was employed by the respondents as a coal trimmer on board the steamship *Königsberg* when lying at Tyne Dock, South Shields, and on February 15, 1922, while erecting some staging he fell into a bunker hatchway and injured his knee. In his application for arbitration under the Workmen's Compensation Acts, 1906 to 1923, he stated that he was totally incapacitated by the accident from February 15 until June 7, 1922, that the respondents admitted liability and paid him compensation at the full rate based upon total incapacity until the latter date, and he claimed similar compensation based again on total incapacity from May 16, 1924, to the present time: and he gave the address of the liquidator in Bremerhaven for service of the copy of his application and notices in accordance with rr. 15 and 16 of the Workmen's Compensation Rules, 1913 to 1924, which in fact was effected under r. 16, sub-r. 3, by registered post.

Pursuant to r. 18, the respondents filed an answer denying liability on various grounds, that the appellant was not employed by them, that compensation has been paid and

the claim satisfied, that the appellant had recovered from his injuries due to the accident, and that his injuries were due to his serious and wilful misconduct. In conclusion they submitted that the Court had no jurisdiction to hear the claim to arbitration, on the ground that the respondents are not within the jurisdiction of the Court.

The last point was argued at the hearing as a preliminary point, when the county court judge ordered the application to be dismissed on the ground that the Court had no jurisdiction.

The appellant appealed. The appeal was heard on May 28 and June 9, 1925.

W. Shakespeare for the appellant.

Walter Lloyd for the respondents took the preliminary objection that there was no right of appeal to the Court of Appeal. The appellant's proper course was to appeal to the Divisional Court: Workmen's Compensation Act, 1906, Sch. II., para. 4. The county court judge having declined to hear the application on the ground that he had no jurisdiction to hear it has made no order. The appeal is from a mere refusal of the county court to deal with the application. Although all appeals on questions of law from the decision of a judge as arbitrator under the Act of 1906, in either making or refusing an award, or in giving any decision or making any order, go to the Court of Appeal direct: *Moss* v. *Great Eastern Ry. Co.* (1), yet in *Howarth* v. *Sir B. Samuelson & Co.* (2), where an application was made to a county court judge to review an award made by a committee of masters and workmen under Sch. II., para. 1, and the judge refused to hear the application on the ground that he had no jurisdiction, it was held that as the judge had refused jurisdiction, the appeal lay to the Divisional Court: see Halsbury's Laws of England, vol. xx., p. 238, § 565, and note (*f*); Annual Practice, 1925, p. 1175.

[ATKIN L.J. The county court judge here has made an order for costs against the appellant.]

(1) [1909] 2 K. B. 274. (2) (1911) 4 B. W. C. C. 287.

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[POLLOCK M.R. We will hear the appeal first and reserve your point.]

W. Shakespeare for the appellant. It is admitted that there appears to be no authority that an applicant is entitled to commence arbitration proceedings against a foreigner resident abroad, but it is submitted that the Act and rules contemplate that such applications should be made and provide for their service by registered post: see Sch. II., para. 11, and Workmen's Compensation Rules, 1913 to 1924, rr. 15, 16, 88, 89, 90. There is nothing in s. 2, sub-ss. 3 and 4, of the Act of 1906 which restricts the service of notices by post to persons resident within the jurisdiction: see also Sch. II., para. 12, and *Rex* v. *Owen*. (1)

Further, even if the point as to jurisdiction is a good one, it is submitted, it has been waived by the respondents. They have put in an answer and have argued the case in the county court.

Walter Lloyd for the respondents. There has been no waiver in this case. The respondents' only course was to appear in the county court and object to the jurisdiction: *Turner* v. *Kingsbury Collieries, Ld.* (2) They put in an answer in which they took the objection that the Court had no jurisdiction to hear and determine the matter, and stated that they were not within the jurisdiction of the Court.

[POLLOCK M.R. referred to *In re Orr Ewing*. (3)]

In that case the Scottish executors appeared without protest, and so submitted to the jurisdiction. Sect. 114 of the County Courts Act, 1888, enables the county court to award costs where the action or matter is struck out for want of jurisdiction.

There was here no suggestion that the appellant was employed by an agent of the respondents.

In *Green* v. *Rutherforth* (4) it was held that no appearance or answer would give jurisdiction to a limited Court.

[ATKIN L.J. That appears to have been a case of entire absence of jurisdiction and not one of mere irregularity.]

(1) [1902] 2 K. B. 436.
(2) [1921] 3 K. B. 169.
(3) (1882) 22 Ch. D. 456.
(4) (1750) 1 Ves. Sen. 462, 470.

In *Pringle* v. *Hales* (1) proceedings for apportionment were commenced in the wrong county court, and it was held that the irregularity was one which could be waived by the defendant. But Sargant L.J. (2) there points out that there are some irregularities which can be waived and others that cannot. The irregularity in this case is one, it is submitted, that cannot be waived.

[ATKIN L.J. All the authorities on the point were considered in *Smythe* v. *Wiles*. (3)]

Where there is no jurisdiction at all the parties cannot by consent give the Court jurisdiction : *Farquharson* v. *Morgan*. (4)

Keymer v. *Reddy* (5) shows that a defendant who objects to the jurisdiction has an absolute right to appear and protest.

[POLLOCK M.R. In that case the defendant had a right to do so under R. S. C., Order XII., r. 30. There is no such right reserved to the respondents under the present procedure.]

The respondents rely on r. 16, sub-r. 6, as showing that the Act of 1906 was not intended to apply to foreigners resident abroad.

Order VII., r. 47, of the County Court Rules shows that a summons must be served personally.

It is submitted therefore that the Court has no jurisdiction under the Workmen's Compensation Acts to deal with a case between a workman in this country and a foreign employer resident abroad.

[He also referred to *Barron* v. *Carmichael* (6) ; *In re Busfield* (7) ; Workmen's Compensation Act, 1906, s. 11.]

W. Shakespeare in reply. The only point is how the liability can be enforced. It is to be remembered that the respondents are in liquidation. The Courts appear to have drawn a distinction between the service of an order directing a liquidator to assess the amount of claim and that of an

(1) [1925] 1 K. B. 573.
(2) Ibid. 583.
(3) [1921] 2 K. B. 66.
(4) [1894] 1 Q. B. 552.
(5) [1912] 1 K. B. 215.
(6) (1912) 5 B. W. C. C. 436.
(7) (1886) 32 Ch. D. 123, 131.

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order on him to pay it when so assessed. The county court judge here was not asked to make any order against the liquidator to pay, but only to assess the amount for which the appellant was to be entitled to prove in the liquidation. The distinction between the two kinds of orders is drawn in *In re General International Agency Co.* (1); *In re Anglo-African Steamship Co.* (2); and *In re Nathan Newman & Co.* (3)

Homer v. *Gough* (4) shows that a county court has no jurisdiction under s. 5 of the Act of 1906 to make an order for payment by the liquidator of the amount of the compensation, but only to assess it.

The appellant's main contention is that the respondents have employed a workman in this country on the terms that they would pay him compensation in accordance with the provisions of the Act of 1906. It is not necessary that the appellant should base his claim on agreement. An agreement will be implied from the fact of the respondents having come over here and employed the appellant.

The words of r. 16, sub-r. 3, as to service by registered post are quite general, and it is submitted it makes no difference whether the employer is an Englishman who has gone abroad or a foreigner who is resident there.

[ATKIN L.J. What do you say as to r. 16, sub-r. 6 ?]

That sub-rule was made in consequence of the doubt raised in *Rex* v. *Owen*. (5)

In any case it is submitted the respondents by coming here, putting in their answer and arguing the case in the county court, have waived their objection to the jurisdiction.

[ATKIN L.J. referred to *George Gibson & Co.* v. *Wishart*. (6)]

Cur. adv. vult.

June 17. The following written judgments were delivered.

POLLOCK M.R. [after stating the facts as above set out]. The duties of acting as arbitrator under the Workmen's

(1) (1867) 16 L. T. 725.
(2) (1886) 32 Ch. D. 348, 350.
(3) (1887) 35 Ch. D. 1.
(4) [1912] 2 K. B. 303.
(5) [1902] 2 K. B. 436.
(6) [1915] A. C. 18.

Compensation Acts are under Sch. II., para. 12, of the Act of 1906 made part of the duties of the county court judge; but it is important to remember that the proceedings are before an arbitration tribunal set up by statute for determining and adjusting from time to time, as circumstances alter, the extent and duration of the employer's liability under the Act, and that, although there is provision for giving effect to the arbitrator's decisions as if they were judgments of a Court, the awards made are not judgments: see per Lords Parker and Sumner in *George Gibson & Co.* v. *Wishart.* (1)

It appears from the application, and indeed from the answer, that the appellant relies upon a contract of employment with the respondents at South Shields, to which the statute by s. 1 attaches a liability. "If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . . be liable to pay compensation. . . . ." And that liability attaches, with certain exceptions, irrelevant to the present case, notwithstanding any contract to the contrary: see s. 3.

Special facilities enlarging the remedies are given, in rem, against the owners of a ship liable as such owners to pay compensation under the Act, for by s. 11, following the Shipowners' Negligence (Remedies) Act, 1905 (5 Edw. 7, c. 10), upon application made to him, a judge of any Court of record in England, upon its being shown to him that the owners are probably liable as such to pay compensation, and that none of the owners reside in the United Kingdom, has power to issue an order detaining the ship until compensation is paid, or security for it given to abide the event. It is not in my judgment necessary to deal further with the question whether a foreigner resident out of the jurisdiction is immune from liability under the Act, for the terms of the Act bring within its ambit all contracts of employment in Great Britain, and give a remedy in case of a probable liability against

(1) [1915] A. C. 18, 35, 42.

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non-residents—a remedy now enlarged by s. 20 of the Act of 1923.

The only question therefore to be considered is whether service by registered post upon the respondents is sufficient to found proceedings—for there is no code established for service out of the jurisdiction as there is under Order XI. for the High Court. Under r. 1 (*e*) of that Order, if the proceedings were a matter of a contract made within the jurisdiction, leave to serve notice of the writ in accordance with its terms could be obtained without serious difficulty, upon proof to the satisfaction of the Court that the plaintiff has a probable cause of action: *Société Générale de Paris* v. *Dreyfus Brothers*. (1) It is not a question of exercising a jurisdiction over persons not British subjects, personally, as in *In re Busfield* (2), or *In re Anglo-African Steamship Co.* (3), where no provision for service on persons residing out of the jurisdiction was provided or available. Sect. 2, sub-ss. 3 and 4, of the Act of 1906, and r. 16, provide for service by registered post.

Now, as I have pointed out, the proceedings under the Workmen's Compensation Act are for the purpose of ascertaining what is the measure of the liability of the respondents which attaches to their contract of employment of the appellant. Service of notice of the proceedings by registered post is prescribed, and in the present case was effective and reached the respondents. In proceedings—in their quality somewhat akin to the present—such a notice has been held sufficient if it satisfies the requirements of natural justice described by Lindley L.J. in *In re King & Co.'s Trade-Mark* (4), as being: "That no man shall have his case disposed of, or be aggrieved or interfered with, without ample notice to him, and an ample opportunity of shewing cause against it." Thus in that case—one over which the Courts in this country had jurisdiction—a notice served by post which reached the respondents was held sufficient. Bowen L.J. (5) draws the distinction between the principle

(1) (1887) 37 Ch. D. 215.
(2) 32 Ch. D. 123, 131.
(3) 32 Ch. D. 348.
(4) [1892] 2 Ch. 462, 482.
(5) Ibid. 484.

of cases where service of the initial process is required in order to found the jurisdiction abroad, and those when the Court at home has jurisdiction over the person or the thing, and points out that the question of the sufficiency of the notice to a respondent is a matter of municipal procedure to be regulated by statute or Rules of Court—or if not so regulated to be judged by the light of natural justice.

So, too, before 1909 it was held that leave could not be given for service out of the jurisdiction of an originating summons, yet that notice might be given of his own motion by the person having the conduct of the proceedings, and if such notice was received and the party did not choose to appear, the Court would take action: *In re Cliff.* (1) This case followed *In re Nathan Newman & Co.* (2), and Lindley L.J. said that the distinction had been properly made in that case between founding proceedings intended to be substituted for an action, and a case where notice is given of an intention to place a person upon a list of contributories of a company in liquidation.

In a very recent case, *Whitney* v. *Inland Revenue Commissioners* (3), we held in this Court that a notice was good which was sent by registered post to an American citizen resident in U. S. A. requiring him to make a return of his income for the purpose of the super tax, inasmuch as he had possessions in this country from which he derived a considerable income. Each member of the Court dwelt upon the right to rely upon a notice by post for which the regulations provided, in cases where proceedings are founded upon matters within the jurisdiction of the Court. Sargant L.J. points out in that case that a wrong analogy was relied upon —an analogy derived from the code under which leave to serve notice of a writ is given. That observation is relevant in the present case. The liability of the employer attached to the contract of employment. The county court judge will proceed to measure that liability in proceedings which are not initiated by a process of the Court requiring the

(1) [1895] 2 Ch. 21. (2) 35 Ch. D. 1.
(3) [1924] 2 K. B. 602.

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attendance of a person before it. "If any respondent desires" are the opening words of r. 18, which admits the respondent to make an answer. A notice of proceedings of this character has been served upon the respondents in accordance with the relevant regulations, and that notice has reached the respondents, so that, apart from regulations, natural justice has been satisfied.

For the above reasons I am of opinion that proceedings in the present arbitration have been properly founded, and that the objection to the jurisdiction fails. Once it is appreciated that the statute applies to an accident arising out of and in the course of any employment in this country, the solution of the question appears to follow, and I may add that if there were no resource available to a workman who had suffered from such an accident, if his employer were outside the limits of territorial jurisdiction, a grave injustice might follow inconsistent with the wide and embracing terms of the statute. It is not necessary to deal with the question of waiver, in the view that I have taken above.

The appeal must be allowed with costs, and the case remitted to the county court to be heard upon its merits.

WARRINGTON L.J. The question in this case is whether the arbitrator to whom questions as to compensation are referred pursuant to the Workmen's Compensation Act, 1906, has jurisdiction to deal with such cases where the employer is a foreigner not resident in the United Kingdom.

The arbitrator—a county court judge, in this case as in most cases under the Act—has decided, as a preliminary point and without hearing evidence on the merits, that he has no jurisdiction and has dismissed the workman's application. The workman appeals.

The workman alleges that he was employed by the respondents, a German company now in liquidation, to do certain work on a ship of the respondents lying at South Shields, and that he there suffered an injury by accident arising out of and in the course of his employment, and claims compensation accordingly. He alleges that the accident having

happened on February 15, 1922, he was paid full compensation until June 7, 1922, when he resumed work, and that he was again totally incapacitated on May 16, 1924, and claims compensation from that date. The judge to whom the application for arbitration is addressed is the judge of the district in which the accident happened : r. 88, sub-r. 1 (ii.) (*a*).

The sealed copies of the application for arbitration, together with the notices required by the Workmen's Compensation Rules, were duly served on the respondents by registered post, as allowed by such rules. The respondents in due course through a solicitor in this country put in an answer disputing the claim on its merits and giving notice that they would submit that "this Honourable Court" (meaning thereby the county court judge before whom the arbitration would take place) has no jurisdiction to hear the applicant's claim to arbitration on the ground stated in the particulars No. 4 given in the answer. Para. No. 4 of the particulars is as follows : "That this Honourable Court has no jurisdiction to hear and determine the matters in dispute herein, and further that the respondents are not within the jurisdiction of the Court."

The arbitrator, as I have said, has decided that the above submission of the respondents is well founded, and has declined to proceed with the arbitration.

The Legislature by the Act in question has thought fit to enact that it shall be one of the conditions of the employment of a workman in this country, that if in such employment personal injury by accident arising out of and in the course of his employment is caused to him, his employer shall in general be liable to pay compensation.

Where as in this case the workman employed is a British subject, the contract of employment is made in the United Kingdom, and the work for which the workman is employed is done here, the nationality or residence of the employer seems to be quite immaterial. A foreign employer under such circumstances must in my opinion be taken to employ the workman upon all the terms and conditions which under the laws of this country the employment is regulated, including

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in particular the condition entitling the workman to compensation for injury by accident. I think therefore the respondents are on the facts alleged, should they be proved, liable to pay compensation.

Then the next question is: can a dispute as to the liability of the foreign employer or as to the amount of the compensation be determined in this country? I think this question is comparatively easy of solution if the true nature of the statutory provisions in this behalf is considered. It is a condition of the employment that the questions as to the workman's title to compensation are to be determined not by action but by arbitration in accordance with the provisions of the Act. In my opinion the foreign employer is as much bound by this condition as by that under which he becomes liable to pay compensation, and the arbitrator if properly selected would have jurisdiction to determine the questions between him and the workman. The arbitrator in the present case is the judge of the county court in the district in which the accident occurred, the proper person under r. 88, where the parties concerned reside or carry on business in different districts. It is true that the respondents do not reside or carry on business in any district in the sense of a county court district, but I agree with the view expressed by Channell J. in *Rex* v. *Owen* (1), that there is no real difference between saying "if they reside in different districts," and saying "if they do not reside in the same district." I do not forget that the decision in *Rex* v. *Owen* (2) dealt only with a case in which the employer resided and carried on business in Scotland. The question whether the same result will follow in the case of one residing and carrying on business in a foreign country was expressly reserved. A great deal of the reasoning on which the decision was based was peculiar to the case before the Court, but for the reasons stated above I am of opinion that the foreign employer in the case supposed is bound to submit to the decision of the question by the arbitrator.

Then the proper steps have been taken and the proper

(1) [1902] 2 K. B. 436, 443. (2) [1902] 2 K. B. 436.

notices served in the proper way, and in my opinion the jurisdiction of the arbitrator to deal with the matter is complete.

The arbitrator appears to have dealt with the case as if it were analogous to that of an action, and as if the service of the documents ought to be regulated in the same way and be subject to the same restrictions as that of a writ of summons.

In my opinion this is a false analogy. There is no question here as to the initiation of process or of any assertion of the authority of the King's Courts over a foreigner. The documents served simply inform him that the arbitration has been applied for and will be proceeded with at a particular time, and give him directions as to what he should do if he wishes to resist the claim: see *Whitney* v. *Inland Revenue Commissioners*. (1)

Reliance was placed in argument by counsel for the respondents on r. 16, sub-r. 6, which provides: "Where the accident occurred in England, and any respondent resides in Scotland or Ireland, service on such respondent may be effected in accordance with this Rule, and service so effected shall be deemed to be sufficient." I see no reason why the mere omission to mention a foreigner should compel one to the conclusion that service cannot be effected abroad, where as I think there are strong reasons outside the rules for arriving at the opposite result.

I would add that I purposely avoid dealing with this case on the ground of waiver of the objection by the form of answer. I do not say for a moment that the objection has not been waived, but I prefer to deal with the case on the broader ground of principle.

The appeal must be allowed with costs here and below, and the matter must be remitted to the arbitrator to proceed with the arbitration.

ATKIN L.J. In this case the applicant was employed by the respondents, the foreign owners of a foreign ship, the

(1) [1924] 2 K. B. 602, 616.

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Königsberg, as a trimmer, while the ship was lying in dock at South Shields. He alleges that while erecting a staging he fell into a bunker hatchway and injured his knee. Compensation was paid from February 15, 1922, the date of the accident, to June 7, 1922. He then resumed work, but claimed that from March 16, 1924, he became again totally incapacitated. A request for arbitration claiming compensation was filed in the county court of Durham holden at South Shields on January 15, 1925. How the copy request and notices under r. 16 were served does not appear, but presumably they were served by registered post under r. 16, sub-r. 3. The respondents on February 14, 1925, filed an answer, the contents of which are material. It states (inter alia): "And further take notice that the respondents intend at the hearing of the arbitration to give evidence and rely on the facts stated in the particulars (2.) hereto. And further take notice that the respondents deny their liability to pay compensation under the Acts in respect to the injury to the applicant, all mentioned in the applicant's particulars on the ground stated in the particulars (3.) hereto. And further take notice that the respondents will submit that this Honourable Court has no jurisdiction to hear the applicant's claim to arbitration on the ground stated in the particulars (4.) hereto. (1*a*) That at the time of the alleged accident the applicant was not immediately employed by the respondents but was employed by Messrs. Bruning & Co., Ld., of Newcastle-upon-Tyne, a co-contractor with the respondents for the execution by or under such contractor of work undertaken by the respondents and the accident and the work was under the control and management of the said Bruning & Co., Ld. (*b*) That liability was not admitted by the respondents. (2*a*) That any compensation due to the applicant has already been satisfied and a final receipt given. (*b*) That the applicant has recovered from the effects of the said accident, and that his present condition is in no way attributable to the said accident but to other causes. (3.) The injury to the applicant was attributable to the serious and wilful misconduct of the applicant. (4.) That this Honourable Court has no

jurisdiction to hear and determine the matters in dispute herein and further that the respondents are not within the jurisdiction of the Court." It is to be noticed that the respondents take no objection to the service of the copy of the application for arbitration or the notice of the hearing. They give notice of what would be defences to the claim, and also give notice that they will dispute the jurisdiction. At the hearing they appeared by their solicitor and disputed the jurisdiction. The learned judge upheld their contention, holding there was nothing enabling the Court to issue and serve process abroad. The above facts appear to raise a strong case of waiver; but such point does not appear to have been raised or decided in the county court, and I propose to deal with the general question. In my judgment the learned judge had jurisdiction, and should have heard and determined the application.

The first and most important question is whether the Workmen's Compensation Acts apply to a foreigner resident abroad who employs in this country a workman under conditions in which if resident in this country he would be liable to pay compensation in pursuance of the Acts. I think that the Acts do apply: just as in my opinion the provisions of the Factory and Mines Acts and other similar statutes would apply which seek to protect workmen from the occurrence of accidents. The operation of the Acts is confined to employment within the territorial limits: and there appear to me to be no reasons based on comity of nations or otherwise why such provisions should not extend to foreigners who pursue their activities in this realm. I think that such an extension to foreigners was intended is indicated by the provisions of s. 11 providing for the detention of ships. That section clearly applies to the foreign owner of foreign ships as well as to British owners. To bring into effect the section it must be alleged that the owners "are liable as such owners to pay compensation under the Act"; and it must be shown "that the owners are probably liable to pay compensation." The applicant may then in substance proceed in rem against the ship. It is to be noted that the

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section does not impose liability, but improves the remedy. The section would be useless against a foreign owner if the applicant could not reasonably state that the foreign owners were liable to pay compensation, and could not in law show to a judge that they were probably liable.

If the Act applies to foreign employers the only question is, have the Act and the rules given an applicant against such employers a remedy correlative to his right to compensation? The more difficult point in this respect appears to me to be to determine in what county court the application must be made. The difficulty is created by the wording of para. 11 of Sch. II. to the Act of 1906. The question was, however, considered in *Rex* v. *Owen* (1) on same words in para. 9 of Sch. II. to the Act of 1897. Both Channell J. and, as I think, Lord Alverstone C.J. were of opinion that the words, "if they reside in different districts," should be read as meaning if they do not reside in the same district. The same words were re-enacted after this decision in the Act of 1906; and in accordance with established rule I think they were so enacted with knowledge of the judicial interpretation already applied to them. I think, therefore, that in accordance with the paragraph in the schedule as so interpreted the county court at South Shields had jurisdiction.

The only other question is whether the rules permit service abroad. I see no reason at all why they should not, once it is found that the Legislature intended to impose liability upon foreigners resident abroad who employ workmen in this country. For this purpose there would be no distinction between a British subject resident abroad and a foreign subject resident abroad, and it seems to me that both notices of accident and notices of request for arbitration and of hearings can all be served in accordance with the Act and rules by registered post. If the document sought to be served purported to exercise any coercive power over the foreign subject, or otherwise purported to exercise any sovereign right inconsistent with his foreign allegiance, different considerations might apply. Here the notices are

(1) [1902] 2 K. B. 436.

but notices for an arbitration to which there has been a statutory submission by the respondents by reason of their having employed a workman in this realm. I see nothing to offend the well established principles of English law relating to the service of process abroad in allowing service abroad in such a case as this. I think that the terms of the Workmen's Compensation Act and rules permit such service, and I think therefore that the judge had jurisdiction. This appeal should therefore be allowed with costs.

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Appeal allowed.

Solicitors for appellant: *Helder, Roberts, Giles & Co.*

Solicitors for respondents: *Gibson & Weldon, for Grunhut & Grunhut, South Shields.*

W. I. C.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

METROPOLITAN WATER BOARD *v.* KINGSTON UNION ASSESSMENT COMMITTEE.

K. B. D. 1925 *Jan.* 14, 15, 16.

C. A. *Feb.* 18, 19, 20, 23, 24; *April* 29.

Rates—Poor Rate—Water Undertaking—Hereditaments in various Parishes—Directly and indirectly profitable Hereditaments—Profits Basis—Contractor's Basis—Parochial Assessments Act, 1836 (6 & 7 *Will.* 4, *c.* 96), *s.* 1.

The Metropolitan Water Board is regulated by statutes restricting the charges and profits which it may make. Its works are situate in various parishes and consist of service pipes said to be directly productive, and of main pipes, pumping stations, reservoirs, buildings and land said to be indirectly productive, of profit. The Board appealed to quarter sessions from an assessment to the poor rate of the hereditaments, and contended that they ought to be valued on what is known as the profits basis, that is to say:—The gross receipts of the whole undertaking as shown on the revenue account for the year were first to be taken; if from these gross receipts were deducted working expenses and tenants' allowances, the balance would represent the gross value of the undertaking; by deducting from this gross value the statutory allowances, the net rateable value including the rates thereon would be ascertained, and the balance after deducting the rates would represent the net rateable value of the undertaking: this amount was then to be distributed among the various parishes as follows:—To the

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indirectly productive portion of the whole undertaking was attributed 2½ per cent. of its capital value; this sum was deducted from the rateable value (including rates thereon) of the whole undertaking; the balance was said to represent the rateable value (including rates thereon) of the directly productive portion; this balance was distributed among the parishes by attributing to each parish a share equal to 6½ per cent. of its revenue; the rates were then deducted and the result was the rateable value of the directly productive hereditaments: to the indirectly productive hereditaments was attributed 2½ per cent. of their capital value to represent their rateable value: the rateable values thus ascertained of the directly and indirectly productive hereditaments respectively when added together represented, as the Board contended, the rateable value of its undertaking in any particular parish.

The rating authority contended that the hereditaments in each parish should be assessed on what is known as the contractor's basis, that is by applying a reasonably remunerative rate of interest to the capital value of the hereditaments, whether directly or indirectly productive, in each parish; and that a reasonably remunerative rate of interest was 5 per cent. of the capital value of the works and 4 per cent. of that of the land.

Quarter sessions having decided in favour of the rating authority:—

Held, by the King's Bench Division and by the Court of Appeal (Bankes L.J. and Lawrence J.; Atkin L.J. dissenting) that the decision of the quarter sessions was wrong and that the hereditaments should be valued on the profits basis.

CASES stated by Middlesex Quarter Sessions.

The Metropolitan Water Board (hereinafter called "the appellants") appealed to quarter sessions against rates made in October, 1920, for the parishes of Teddington, Hampton Wick, and Hampton in respect of hereditaments occupied by them in those parishes.

The hereditaments in question consisted of service pipes (directly productive) and carrying and pumping mains (indirectly productive). Both classes of pipes were laid underground. There were no works above the surface of the ground in the parishes of Teddington and Hampton Wick, but in the parish of Hampton there were works of very great value above the surface of the ground used for the appellants' undertaking, both within and outside that parish. The capital value of the hereditaments in each of the three parishes was agreed, and the question for the Court was whether the proper basis of assessment should be upon the profits basis system or upon a percentage on structural value.

The appellants were constituted by the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), and their charges for water were regulated by the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.). They contended that the proper method of arriving at the value of their undertaking was to ascertain its total rateable value upon the basis of their revenue account for the year ending March, 1920, and to distribute the rateable value so arrived at by the method more particularly shown in paras. 7 and 8 in their statement of facts, which were as follows :—

" 7. The appellants contend that the proper method of ascertaining the value of the water undertaking in the said parish (1) is that usually followed in arriving at the rateable value of the part of a water undertaking in a parish where the undertaking extends into several parishes. This was the method followed by the appellants and adopted by the Court of quarter sessions for the county of London in the recent appeals by the appellants against the quinquennial valuation of their undertaking in the several parishes and boroughs in the metropolis under the Valuation (Metropolis) Act, 1869. The total rateable value of the entire water undertaking is first ascertained upon the basis of the Board's revenue account for the year ended March, 1920. From the gross receipts are deducted working expenses, allowances to tenant and the cost of repairs, renewals, etc., the balance remaining being the rateable value of the entire undertaking. It is then necessary to distribute this rateable value among the various parishes into which the undertaking extends, and again the usual method of distributing this rateable value has been followed as was adopted in the other rating areas referred to. The rateable value of the indirectly productive portion—consisting of land, works (including intakes, filter beds, reservoirs, pumping stations, etc., also carrying and pumping mains)—is ascertained upon what is known as the ' contractor's principle ' (2), applying a percentage to the

(1) The parish of Teddington is taken as an example.

(2) " In some cases and most frequently in valuing the indirectly productive portions of gasworks, or waterworks, the Courts . . . . have

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structural value thereof. This sum, including the rates thereon, is deducted from the rateable value, including rates, of the entire undertaking; and the balance remaining is the rateable value, including rates, of the directly productive portion or service pipes. This rateable value is distributed among the several parishes in proportion to the revenue from supplies in each particular parish. By this means the sum of the rateable value of the Board's undertaking in each parish approximates to the total rateable value of the entire undertaking based upon the said revenue account.

8. The appellants rely upon the following figures to ascertain the rateable value of the entire undertaking :—

	£
Gross receipts	3,105,649
Working expenses, ex rates	1,593,287
Net receipts, including rates . . .	1,512,362
Tenant's share 7 per cent. of gross receipts	217,395
Gross value, including rates . . .	1,294,967
Statutable deductions	287,701
Rateable value, including rates . . .	1,007,266
Deduct rates on rateable value here found at 13*s.* in the £	396,802
Rateable value of the entire undertaking .	£610,464"

The distribution of the proper proportion of the total rateable value of their undertaking in the parish of Teddington was, they said, as follows :—

Revenue derived from supplies in the parish for the year ending March 31, 1920 . . . . . £6366

regarded as evidence of value, what is commonly called 'the contractor's test,' that is the interest on cost, which a contractor would require, if he provided the land and buildings for their present occupier. It has been pointed out that the test must be not what the contractor would demand, but what he would be likely to get; and that the reasonable expectation of a contractor is a rough test, and some prima facie evidence, capable of being cut down by evidence on the other side, but not altogether to be put out of sight."—Ryde on Rating, 4th ed. (1920), p. 242.

	£
Directly productive :—	
Rateable value, including rates, of service pipes calculated at 6½ per cent. of the revenue .	413
Deduct rates at 14*s.* 8*d.* in the £ on the rateable value here found—namely, 238*l.* . . .	175
	238
Indirectly productive :—	
Add rateable value of the indirectly productive portion in the parish calculated at 2½ per cent. of the structural value as agreed, 23,755*l.* .	594
Total rateable value of the undertaking in the parish	832
Add statutable deductions	416
Gross estimated rental of the undertaking in the parish	£1248

The gross estimated rental and rateable value of the appellants' undertaking were entered in the valuation list for Teddington at 2484*l.* and 2114*l.* respectively, while, as stated in the foregoing paragraph, the gross estimated rental and rateable value, if the appellants' contention were adopted, came to 1248*l.* and 832*l.* respectively.

The figures for Hampton Wick as entered in the valuation list were 2061*l.* gross estimated rental and 1803*l.* rateable, while on the appellants' contention the figures should be 1302*l.* and 868*l.*

The corresponding figures for Hampton were, in the valuation list 85,446*l.* and 67,862*l*, and, on the appellants' contention, 52,220*l.* and 34,220*l.*

The respondents contended (*a*) that the method of valuation sought to be applied by the appellants took no account of the rents at which the hereditaments might reasonably be expected to let from year to year and did not comply with the provisions of the Parochial Assessments Act, 1836, s. 1 ; (*b*) that the appellants, being a public body and occupying the hereditaments for the purpose of carrying out their statutory duties and not for the purpose of earning profits,

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the profits-earning basis was not the true test of the rateable value of the hereditaments; (*c*) that the true method of ascertaining the rateable value was by applying a reasonably remunerative rate of interest to the capital value of the hereditaments; (*d*) that 5 per cent. was a reasonable rate upon the agreed capital value of the works and mains, and 4 per cent. upon the agreed capital value of the land.

It was admitted or proved that if the appellants' method of assessment was applied the assessment should be reduced to the amounts claimed by them, while, if the respondents were right, the assessment was to stand.

No other method was suggested by either side for the purpose of arriving at the rateable value of the hereditaments.

Quarter sessions, being of opinion that the respondents' contentions were correct, dismissed the appeals, but stated these cases for the opinion of the Court.

Tyldesley Jones K.C. and *Hon. S. O. Henn Collins* for the appellants. The question is whether the hereditaments in question are to be assessed, as we contend, upon the basis of appellants' receipts and expenditure, or, as the respondents contend, upon the contractor's basis, that is, upon a percentage on the structural value. Ever since *Reg.* v. *Mile End Old Town Overseers* (1) water undertakings have been assessed on the receipts and expenditure basis. What has to be ascertained is the amount that a hypothetical tenant would pay for the undertaking as a whole. The hypothetical tenant would look first at the total revenue, and then, by making the necessary deductions for cost of carrying on the undertaking, etc., he would arrive at the amount he would be willing to pay as rent. The amount so arrived at is the rateable value of the undertaking. That rateable value has then to be apportioned among the different parishes into which the undertaking extends, the method of apportionment being laid down in *Reg.* v. *Mile End Old Town Overseers.* (1) There it was decided that the rateable value of the indirectly productive works (reservoirs, buildings, etc.),

(1) (1847) 10 Q. B. 208.

valued as land and buildings deriving additional value from their capacity of being applied to the objects of a water company, is to be deducted from the total rateable value and distributed among the parishes in which this portion of the works is situated, according to the extent of the works in each parish; and the residue of the rateable value, that is, of the directly productive works—service pipes—is apportioned among the parishes in which they are situate in proportion to the net profits produced in each parish. In that case the total rateable value had in fact been ascertained, and the Court was merely concerned to lay down what was the right method of its distribution among the various parishes; but in *Reg.* v. *West Middlesex Waterworks Co.* (1) the Court said that the total has first to be ascertained, and further that the occupiers in each parish must be protected from being rated beyond the rateable value of the whole undertaking: see also per Lord Loreburn in *Great Central Ry. Co.* v. *Banbury Union.* (2) In *Liverpool Corporation* v. *Wavertree Overseers* (3), where the corporation were precluded by statute from charging the water consumers more than was necessary to pay the estimated expenses of the water undertaking, it was held that a hypothetical tenant of the undertaking would give only such a rent as the statutory restrictions would enable him to earn, and that the rateable value was to be based upon that rent. The same rule was laid down in *Worcester Corporation* v. *Droitwich Assessment Committee* (4); and in *Peterborough Corporation* v. *Stamford Union.* (5) In *London County Council* v. *Erith Overseers* (6), where those earlier cases were not dissented from, it was held that sewers and board schools did not escape rateability because they were not revenue-producing; but the decision there is confined to sewers and board schools: see *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull.* (7) In the *Erith* case (6) Lord Herschell said (8): "There is no doubt a certain

(1) (1859) 1 E. & E. 716.
(2) [1909] A. C. 78, 87.
(3) (1875) 2 Ex. D. 55n.
(4) (1876) 2 Ex. D. 49.
(5) (1883) 31 W. R. 949.
(6) [1893] A. C. 562.
(7) [1895] A. C. 136, 149.
(8) [1893] A. C. 592.

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class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must of course be considered." That passage is not confined, as is suggested by the respondents, to trading companies. A profit-bearing undertaking means a revenue-producing undertaking, and the appellants come within it as making a profit in order to pay their debt charges. The words "profit-bearing undertaking" were held in *Port of London Authority* v. *Orsett Union* (1) to apply to the Port of London Authority, which is a body analogous to the present appellants. Lord Dunedin there pointed out (2) that "sterility in earning profits is one thing, sterility in disposing of profits is another. The former affects the value—the latter does not." Lord Buckmaster also pointed out (3) that not only must the disabilities imposed by an Act of Parliament be taken into consideration, but also the privileges and opportunities created thereby: see also to the same effect per Lord Esher in *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union*. (4) It is admitted by the respondents that the method of assessment contended for by the appellants is the proper method in the case of a trading waterworks undertaking, but it is said that if the undertaking is transferred to a local authority or to a water board which supplies water not with the intention of making a profit, but for the good of the community, the method of assessment is entirely altered. It was pointed out by Lord Dunedin in *Port of London Authority* v. *Orsett Union* (5) that the transfer of a

(1) [1920] A. C. 273.
(2) Ibid. 299.
(3) [1920] A. C. 305.
(4) (1886) 17 Q. B. D. 384, 387.
(5) [1920] A. C. 273, 296.

dock undertaking from a company to a public authority could not alter its rateable value. If the appellants' method of assessment is right (and it was adopted in *Metropolitan Water Board* v. *City of London Union* (1), the method of apportionment settled in the *Mile End Old Town* case (2) must be applied. The House of Lords held in *Metropolitan Water Board* v. *Chertsey Union* (3) that in reference to the indirectly productive part a reasonably remunerative rate of interest which a contractor could expect to get must be taken, and Lord Parker said (4) that it lay on those who said that the ordinary percentages of 5 per cent. or 4 per cent. ought not to be taken to show why those percentages ought not to be taken. In the present case it is shown that the appellants cannot afford to pay the ordinary rate. Lord Herschell in the *Erith* case (5) said that "the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises."

Mitchell-Innes K.C., *Hon. Sir Malcolm Macnaghten K.C.* and *Walter Hedley* for the respondents. With the possible exception of *Reg.* v. *West Middlesex Waterworks Co.* (6), no case purports to lay down as a rule of law that waterworks ought to be rated on the principle of profits. The *West Middlesex Waterworks* case (6), when carefully examined, did not lay down as a proposition of law that the profit basis was obligatory in ascertaining the rateable value of such a hereditament; the Court merely accepted that basis, and considered nothing but the question of apportionment. The appellants are therefore asking this Court to say which of two competing methods of valuation should be adopted. That question is one of fact exclusively for quarter sessions.

[AVORY J. Lord Dunedin in the *Port of London Authority*

(1) (1907) 1 Konstam's Rating Appeals, 33.
(2) 10 Q. B. 208.
(3) [1916] 1 A. C. 337.
(4) Ibid. 361.
(5) [1893] A. C. 593.
(6) 1 E. & E. 716.

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case (1) said that "the question of what an assessing body ought to do in a particular case cannot be laid down without trenching on a question of fact. But if an assessing body, having considered the case, bases its valuation on the view either that it must do or that it must not do a certain thing in arriving at that valuation, that is a question of law, and the Courts of review may say whether the assessing body was right or wrong."]

The general rule for estimating the rateable value of hereditaments is laid down in the Parochial Assessment Act; the difficulty lies in its application to the circumstances of the particular case. Lord Esher in *North and South Western Junction Ry. Co.* v. *Brentford Union* (2) said: "In many cases questions of this kind have been raised, and what the Courts have done over and over again is to say that the particular mode of estimating the rateable value adopted in the particular case before them was not under the circumstances contrary to the rule of law laid down by the statute; but I do not think they meant to say that such mode of applying the rule so laid down was necessarily and in all such cases the only correct mode." In the *West Middlesex Waterworks* case (3) the Court did not say that the method there adopted was the only right method. Lord Herschell in the *Erith* case (4) spoke of "gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking." It cannot be suggested that the Metropolitan Water Board is an industrial undertaking. "Industrial undertaking" means a commercial undertaking. Before the passing of the Metropolitan Water Board Charges Act, 1907, the Water Board were in the same position as the old water companies; the Board were forbidden to lower the charges and therefore were rated on the same basis as the old water companies; but now their maximum charges are restricted. The Board came into existence to perform a public service and not to make profits, and therefore ought not to be rated on profits. The effect of applying the profits

(1) [1920] A. C. 293.
(2) (1887) 18 Q. B. D. 740, 754.
(3) 1 E. & E. 716.
(4) [1893] A. C. 592.

basis to the rating of this concern is to make it impossible for the Board to apply any rate of interest to the indirectly productive part which can represent an adequate remuneration to a contractor. Further, on that basis, if the debts of the Board are paid off and the water stock redeemed the rateable value of the undertaking will be nil. With regard to *Great Central Ry. Co.* v. *Banbury Union* (1), it is to be noted that while the other portions of the railway company's system were rated on the profits basis, it was sought to rate the portion of the line in question on the contractor's basis. The House of Lords said that that could not be done. The case was very special on its facts, and it deals with a profit-making company.

Tyldesley Jones K.C. replied.

LORD HEWART C.J. In these three cases, which raise substantially the same point and which for convenience have been heard together, the question, which is one of law, is whether quarter sessions came to a right determination upon certain submissions made at the hearing of the appeals. As Lord Dunedin said in *Port of London Authority* v. *Orsett Union* (2): "The question of what an assessing body ought to do in a particular case cannot be laid down without trenching on a question of fact. But if an assessing body, having considered the case, bases its valuation on the view either that it must do or that it must not do a certain thing in arriving at that valuation, that is a question of law, and the Courts of review may say whether the assessing body was right or wrong."

The hereditaments now in question are portions of the undertaking of the Metropolitan Water Board—an undertaking which is not a collection of unrelated parts, but an organic whole spread through many unions and parishes. Particular parts of that organic whole have to be rated. These differ somewhat in the three cases. In one there is a more directly productive asset, in another less, while in the third there are both directly productive and indirectly

(1) [1909] A. C. 78. (2) [1920] A. C. 273, 293.

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productive portions of the Board's apparatus. But in all the cases it was contended by the respondents that in view of the peculiar nature of the Board and its duties—being a public body and occupying the hereditaments for the purpose of carrying out its statutory duties and not for the purpose of earning profits—its receipts ought to be disregarded by the assessing authority, and that the true test was to apply the contractor's principle, that is, the application of a certain percentage to the capital value of the particular hereditaments. Quarter sessions accepted that contention and disregarded entirely any question of receipts. They rejected the appellants' contention, which was that the proper method was, first, to ascertain the rateable value of the entire undertaking upon the basis of the revenue account, and secondly, to distribute the rateable value so arrived at by the well known method which is set out in the special cases. No doubt it is difficult to arrive at the rateable value of a particular part of a great water undertaking, and no doubt there is some artificiality in the process, but the problem to be solved, whether the hereditament to be considered is a water undertaking or one of a much simpler kind, is the same—namely, to ascertain, as is provided by s. 1 of the Parochial Assessments Act, 1836, "the rent at which [the hereditaments] might reasonably be expected to let from year to year free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." The problem being thus to ascertain the rent which the hypothetical tenant might be reasonably expected to pay, it was urged on behalf of the appellants that it is not merely right, but necessary, to look at their revenue account, to have regard to their receipts, and that the hypothetical tenant must be one limited by the same restrictions and fetters as those which under the statute restrict the appellants themselves.

I will deal first with the question whether profits—an ambiguous term often used as synonymous with receipts—

are to be looked at. As a matter of history the doctrine that in dealing with waterworks the assessing authority ought to look at actual receipts, begins with the decision in *Reg.* v. *Mile End Old Town Overseers.* (1) There the rateable value of the whole undertaking had in fact been ascertained, and the question for the consideration of the Court was the principle upon which the sum so ascertained ought to be divided among the several districts. Lord Denman, delivering the judgment of the Court, said (2): "The first step in apportioning has been in effect to divide the whole apparatus constituting the rateable subject into two portions; of which one is directly productive of rateable value, being the service pipes which deliver the water to the consumer; the other indirectly conduces to such production, being the rest of the works bringing the water to the service pipes. The second portion has been first rated in the ordinary way by valuing the land with the buildings and fixtures thereon, and the amount of rate so ascertained has been deducted from the sum of rateable value, and distributed to the districts in which the parts of this portion are situate." Then having referred to some analogous cases Lord Denman continued: "The remaining step has been to apportion the residue of the rateable value among the districts in which the direct productive portion of the works is situate, in the ratio either of the net profits, or of the gross receipts, or of the quantity of mains and pipes, and of the land occupied by them, in each district. Each ratio in the present case gives the same result: if they differed, it would be necessary to select between them; and that ratio should be preferred which would best show the rent to be expected if the part of the works situate in the district was let separate." Later, he said: "The net profits in each district would be ascertained by distributing the expense among the several districts; and it would be distributed in the ratio of the gross receipts in each; and, if a proportional deduction should be made from the gross receipts in each, the ratios of the remainders to each would be the same as the ratios of the gross receipts."

(1) 10 Q. B. 208. (2) 10 Q. B. 220, 222.

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Finally he said: "By the method adopted in this case, the rateability of the portion of the apparatus indirectly conducing to produce profit is provided for, and the residue of the sum of rateable value is apportioned to those parts of the apparatus directly producing profit, in analogy to the mileage proportion for canals and railways."

In 1859 that case, the principle of which, we are told, was observed in practice both before and after 1847, was considered in argument in *Reg.* v. *West Middlesex Waterworks Co.* (1), where a step forward appears to have been taken from the decision in *Reg.* v. *Mile End Old Town Overseers* (2), because, while in fact in that case a particular method had been observed, in the later case it was said that that was the method which ought to be observed. In the *West Middlesex Waterworks* case (1) there was a preliminary question whether the company was rateable at all for certain mains and the Court decided that it was. The second question was as to the principle upon which the company should be rated, and as to that Wightman J., delivering the considered judgment of the Court (Lord Campbell C.J., Wightman, Erle and Hill JJ., of whom Wightman and Erle JJ. had been parties to the decision in the *Mile End Old Town* case (2)), said (3): "If such an apparatus"—that is the complicated apparatus of a water company, consisting of many different kinds of instruments—"lies in several parishes, the occupier is liable for the same amount of rateable value and no more"—that is no more than if it were all in one—"but that amount is to be apportioned among the parishes in which it lies; and the question then arises, as in the case, what is the principle which regulates such apportionment? It is clear that each parish must rate the part that lies within it: such part becomes a separate rateable subject in that parish, and must be rated, according to the Parochial Assessments Act, upon an estimate of the rent which that part would yield after proper deductions. In practice a tenant of the parochial portion of a canal, railway, gasworks, waterworks, or the like, has rarely, if

(1) 1 E. & E. 716. (2) 10 Q. B. 208.
(3) 1 E. & E. 721.

ever, been known. But an hypothetical tenant must be assumed; and the terms of such a tenancy are not difficult to be conceived. If, in the hypothesis, some necessary incidents are also assumed to be involved, such as, first, that each part of the apparatus is to continue in joint co-operation, no one tenant of an essential part being able to stop his part; secondly, that the title to the required land is permanent, so that there is no risk of being compelled to move fixed capital; thirdly, that there is land in the required quantity, and capital to be invested therein, and occupants ready to take and work parts yielding profit, as tenants at rack rent, and parts not yielding profit, as contractors for remuneration, provided any greater profit can be obtained than is ordinary in such relations. If a tenancy of each parochial part be assumed according to this hypothesis, then, although each parish rates separately upon its own estimate of the value of the part lying within it, and the law gives no power of making all the parishes co-operate in rating the several parts lying in each, nevertheless this Court is bound to protect the occupier of such an apparatus from being rated beyond the rateable value of the whole taken together: and it is in reference to this protection that the Court must take into its consideration at once all the separate rates, as so many claims upon one given fund, and must apportion that fund, bearing in mind that every addition to the rateable value assigned to one parish must be a subtraction from the rateable value which might be given to some other parish."

After the decision in that case it is not surprising to hear that the practice in rating a water undertaking has been to start by ascertaining the rateable value of the whole, and, that having been ascertained, to divide and apportion that whole fairly in accordance with those principles among the various unions concerned. If it be right in such a case to have regard to receipts, what is to be said of statutory restrictions imposed upon those who have the opportunity of obtaining the receipts? It is said, for example, that the Metropolitan Water Board is restricted in a way quite different from the way in which a commercial company is restricted.

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It is said that the Board's statute imposes, both as to the amount and as to the destination of the Board's receipts, restrictions of a special kind. It appears to be established by a considerable line of authority that where for the purpose of ascertaining the rateable value, receipts and profits may be looked at, they must be looked at rebus sic stantibus, that is to say, subject to the existing conditions and limitations whatever they may be. That proposition was expressed in a single sentence in *Port of London Authority* v. *Orsett Union* (1) by Lord Buckmaster who, referring to the decision in *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (2), said this (3): "In other words that decision emphasized and made clear a principle that must always be applicable to such cases. The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament." That doctrine is laid down in clear terms in a series of cases. In *Liverpool Corporation* v. *Wavertree Overseers* (4), Blackburn J. said: "The whole question turns on the rule given by the Parochial Assessments Act, which says the occupier is rateable at what a tenant from year to year will give as the rent, who takes the land subject to the same restrictions as those under which the appellants hold it. Now the tenant would only give such a rent as the restrictions imposed by statute would enable him to earn; and the rateable value is to be based upon that rent." That judgment was cited and followed in *Worcester Corporation* v. *Droitwich Assessment Committee* (5), where the first paragraph of the headnote is as follows: "Where land is used for a public purpose, and the occupiers thereof are prevented by statute from deriving the full pecuniary benefit which it is capable of producing, the land is to be rated to the poor with reference to the amount of profit actually made, and

(1) [1920] A. C. 273.
(2) [1895] A. C. 136.
(3) [1920] A. C. 305.
(4) 2 Ex. D. 55n.
(5) Ibid. 49.

not with reference to the amount which might be earned by the occupiers if they were not subject to restrictions." Cleasby B., giving the judgment of the Court, consisting of himself and Field J., said (1): "The only question, therefore, is whether a public body exercising their powers properly for the benefit of the inhabitants, and making their rates bona fide for that purpose and so regulating their conduct by the restriction, as it may be called, of acting in obedience to the Act of Parliament, can be properly represented for the purpose of rating by a hypothetical tenant acting under no such restriction. We are of opinion that they cannot. They only acquire the right to the rates by the Act of Parliament for the purpose of carrying the objects of the Public Health Act properly into effect, and the profitable occupation which they in fact have is the only one which they can properly have, and it would be strange to rate them, not in respect of what they can properly enjoy, and do enjoy, but in respect of what they cannot properly enjoy and do not enjoy." In the Court of Appeal that judgment was upheld, and *Liverpool Corporation* v. *Wavertree Overseers* (2) was referred to. Mellish L.J., delivering the considered judgment of the Court, said (3): "We may also observe that the reservoir by itself, without the power of connecting the reservoir with the houses by pipes running through the streets, is probably worth nothing, and certainly is not worth 651*l.* a year; and it is the same Act of Parliament which gives the power to lay the pipes and therefore creates the value of the reservoir, which contains the restrictions on the amount of profit which the occupiers of the reservoir can earn." In the result the Worcester Corporation was held to be rateable, not indeed at nothing —by no means nothing—but at a sum of 540*l.* That case has been referred to again and again since 1876; it has from time to time been distinguished; but in my opinion it is not correct to say that its efficacy in cases to which it is applicable has in any sense been diminished. In *West Bromwich School Board* v. *West Bromwich Overseers* (4), that

(1) 2 Ex. D. 58.
(2) Ibid. 55n.
(3) 2 Ex. D. 61.
(4) (1884) 13 Q. B. D. 929.

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case was considered in contrast with *Chorlton-upon-Medlock Overseers* v. *Chorlton Union* (1), and it was said that those cases were reconcilable, and that *Worcester Corporation* v. *Droitwich Assessment Committee* (2) was rightly decided in the class of material with which it was concerned. Bowen L.J. said (3): "In *Chorlton-upon-Medlock Overseers* v. *Chorlton Union* (1) the judges of the Queen's Bench Division did not intend to dissent from *Worcester Corporation* v. *Droitwich Assessment Committee*. (2) None of the cases cited are in conflict with the principle I have referred to."

The same principle was upheld in *Peterborough Corporation* v. *Stamford Union* (4), of which it is not possible to speak in the same unqualified way. There the judgments are to be read in close connection with the particular facts and the particular issues raised. Somehow the conclusion was arrived at that the value at which the hereditament was to be assessed was nil. That is a conclusion, to be understood only, if at all, in relation to the particular facts and the particular controversy, but A. L. Smith J. said this: "The facts in this case are very similar to those in *Worcester Corporation* v. *Droitwich Assessment Committee* (2), and I think that case is on all fours with this and governs it."

More recently a like principle has in effect been laid down in the House of Lords in *London County Council* v. *Erith Overseers* (5), where Lord Herschell L.C. said this (6): "There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-bearing undertaking, the profits earned and the share of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these any restrictions which the law has imposed upon the profit-earning capacity

(1) (1882) 51 L. J. (Q. B.) 458.
(2) 2 Ex. D. 49.
(3) 13 Q. B. D. 943.
(4) 31 W. R. 949, 950.
(5) [1893] A. C. 562.
(6) Ibid. 592.

of the undertaking must of course be considered." For the present respondents it is said that to appreciate the effect of that statement of Lord Herschell, special stress is to be put upon the words "industrial" and "profit-bearing." I think that argument is too subtle. "Profit-bearing" in its context seems to me to mean and to involve no more than "revenue-producing," and Lord Herschell was expressly contemplating that in the case of such undertakings as those to which he referred there might be restrictions imposed by law upon the profit-earning capacity of the undertaking. He said that not only were the profits to be taken into account, but the restrictions must of course be considered. It would be a curious paradox if, in dealing with a purely commercial company, those restrictions were to be taken into account, while in dealing with such a body as the Metropolitan Water Board, restrictions of a like, or of a more stringent, nature ought to be ignored. In *Port of London Authority* v. *Orsett Union* (1) Lord Dunedin said that "sterility in earning profits is one thing, sterility in the disposing of profits is another. The former affects the value—the latter does not."

Having regard to all these authorities I think it is clear that in arriving at the rateable value of the parts of the appellants' undertaking now in question it is wrong to refuse to look at receipts, and it is wrong to say that by reason of the special position which the appellants occupy under their statute, the undertaking must be subject to another and more onerous method of rating.

To return to the respondents' contentions, these were (*a*) "That the method of valuation contended for by the appellants"—that is, the method prescribed in the *Mile End Old Town* case (2) and the *West Middlesex Waterworks* case (3) —"took no account of the rents at which the hereditaments in question might reasonably be expected to let from year to year and did not comply with the provisions of the Parochial Assessments Act, 1836": (*b*) "That the appellants being a public body and occupying the hereditaments in question

(1) [1920] A. C. 273, 299. (2) 10 Q. B. 208.
(3) 1 E. & E. 716.

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for the purpose of carrying out their statutory duties and not for the purpose of earning profits the profits-earning basis contended for by the appellants was not the true test of the rateable value of the hereditaments in their occupation"; (*c*) "That the true method of ascertaining the rateable value of the hereditaments in question was that of applying a reasonably remunerative rate of interest to the capital value of the hereditaments"; (*d*) "That where, as in the case of this parish, the hereditaments in question consist partly of land and partly of works and mains, 4 per cent. upon the agreed capital value of the land and 5 per cent. upon the agreed capital value of the works and mains were reasonable rates of interest to take for the purpose of ascertaining the rateable value." These propositions are really antecedent to and consequential upon proposition (*c*), which was the real contention urged as a matter of law by the respondents: "That the true method of ascertaining the rateable value of the hereditaments in question was that of applying a reasonably remunerative rate of interest to the capital value of the hereditaments." As a matter of law, quarter sessions were asked to determine what was the true method to the exclusion of any consideration of receipts or profit-earning capacity, and quarter sessions took that view.

In my opinion, for the reasons given, quarter sessions came to an erroneous determination in point of law. It was not correct to say that the contractor's principle was the principle to be observed here. On the contrary, it was right to have regard to the revenue account, to the receipts of the undertaking, and to the restrictions to which it was subject by statute. The appeals must therefore be allowed.

AVORY J. I am of the same opinion. Three questions are raised for our decision: (1.) whether there was any question of law before quarter sessions or raised by these special cases? (2.) what is that question of law, if there be one? and (3.) are the appellants or the respondents right upon that question of law?

I cannot doubt that there is a question of law raised by

these special cases, and I only wish to add one observation to what my Lord has said upon this point, because there is sometimes a temptation to get rid of a difficult question of law by saying that it is a question of fact. The mere agreement between the parties to treat this as a question of law at quarter sessions, and the fact that quarter sessions have stated these special cases is, of course, not conclusive; it is still open to this Court, or any other appellate Court, to say that there is really only a question of fact. But having regard to the way in which the cases are stated, I cannot doubt that it was intended to raise a question of law, and that the cases do so—namely, whether in arriving at the rateable value of such a hereditament as is in question, the only method of arriving at it correctly is on what is called the contractor's basis, without any regard to the receipts or revenue or the balance of receipts over expenditure. That is the question. There might have been no question of law if quarter sessions had said: "Having heard the evidence on both sides—as to the cost of construction and a reasonable percentage upon it and also as to the receipts and expenditure of the undertaking—we find as a fact that the rateable value is so and so." If that had been said I doubt whether we could have interfered, but quarter sessions here in effect said: "We think the only proper way of arriving at the rateable value is to look at the contractor's basis and to ignore the whole of the evidence with regard to receipts and expenditure, etc., put forward by the appellants."

There being then, in my view, a question of law, it remains for us to determine which of the parties is right, and after the exhaustive judgment delivered by my Lord, it is sufficient for me to base my judgment upon this proposition that *Reg.* v. *West Middlesex Waterworks Co.* (1) is a direct authority that the proper method of rating such a hereditament as that in question is that which was adopted in that case. And I propose to show that so far from that decision ever having been doubted it has been either expressly or impliedly approved up to the House of Lords.

(1) 1 E. & E. 716.

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In *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (1), Blackburn J., recognized universally as one of the greatest authorities on this branch of the law, in delivering the considered judgment of the Court, said this (2): "The case came on for argument some time since, when the latest decisions on this subject in the cases of *Reg.* v. *Mile End Old Town Overseers* (3) and *Reg.* v. *West Middlesex Waterworks Co.* (4) were brought to our notice. We so fully concurred with what was observed by Wightman J. in the latter case"—and then he quotes the following observations made obiter by Wightman J.: "There appears to me, however, so much difficulty in satisfactorily applying the parochial principle of rating by estimating the rent which a tenant would give for the subject matter in such a case as the present as practically to amount, nearly if not entirely, to an impossibility of doing so satisfactorily." Blackburn J. then proceeded: "Indeed, the whole subject matter appears to be involved in so much difficulty and uncertainty, that we have taken much time in considering whether, notwithstanding these decisions, we could not place the rules as to the rating of these companies on more intelligible and satisfactory principles, and which should be capable of uniform application. We have not, however, succeeded in laying down a rule which would be consistent with the existing legislation and decisions on this subject, and would at the same time be capable of being satisfactorily worked; and we are strongly impressed with the importance of not unsettling the law as established by past decisions, where we cannot lay down a rule which is not open to exception. On the whole, therefore, we feel that our only course, until the Legislature shall think fit to interfere, is to adhere to the case of *Reg.* v. *West Middlesex Waterworks Co.* (4); and, in answering the questions put in this case, to confine ourselves to inquiring whether the principles laid down in that case have been properly applied in the present." The Court then proceeded to apply those same principles in the case then under consideration.

(1) (1863) 4 B. & S. 135.
(2) Ibid. 145.
(3) 10 Q. B. 208.
(4) 1 E. & E. 716.

Following upon that it appears to me that the decision was expressly approved in the House of Lords in *Metropolitan Water Board* v. *Chertsey Union*. (1) Dealing there with the same undertaking, the Metropolitan Water Board, Lord Atkinson said (2): "The principle to be applied in cases such as the present has been well established since the year 1847, when the case of *Reg.* v. *Mile End Old Town Overseers* (3) was decided, ..." and he then quoted with approval what Wightman J. said in *Reg.* v. *West Middlesex Waterworks Co.* (4) Lord Atkinson then cited the judgment of Blackburn J. in *Sheffield United Gas Co.* v. *Sheffield Overseers* (5), to which I have already referred, based upon *Reg.* v. *West Middlesex Waterworks Co.* (4); and he obviously approved of the principle there laid down. In *Great Central Ry. Co.* v. *Banbury Union* (6), Lord Loreburn, in giving judgment to the effect that the contractor's basis was not a proper method to apply to a portion of a railway line, said (7): "It would be equally reasonable for the railway company to say: 'Here is a mile of railway line; you are to isolate it from the rest of the system, for all you are to rate is this single mile; no one would give a sixpence for an isolated mile of railway; therefore the rateable value is nil. . . . .' Each section is regarded as a profit-earning part of the system to which it belongs; each section is indispensable to the working of the system; and I think the resulting inquiry is, if the whole system were to be let at once, though it be in separate sections, how much of the rent that a tenant would give for the whole is applicable to the particular section which is to be assessed? That depends on profit earning." Later, he said this: "It would be practicable, though I think it would be wrong, to rate every section of a line on the annual equivalent of its cost. But I do not think it is even practicable to adopt a mixed calculation based partly on profit earning and partly on cost. As Wightman J. said in *Reg.* v. *West Middlesex Waterworks Co.* (4), the Court is bound to protect

(1) [1916] 1 A. C. 337.
(2) Ibid. 349.
(3) 10 Q. B. 208.
(4) 1 E. & E. 716.
(5) (1863) 4 B. & S. 135.
(6) [1909] A. C. 78.
(7) Ibid. 86.

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the occupier from being rated beyond the rateable value of the whole apparatus taken together; and that could not be done under the mixed method adopted in this case." That, again, is an approval of the judgment of Wightman J. in *Reg.* v. *West Middlesex Waterworks Co.* (1), and particularly of that part of it which appears to me to be in direct conflict with the present respondents' argument: "The Court is bound to protect the occupier of such an apparatus from being rated beyond the rateable value of the whole taken together." The inevitable result of adopting the contractor's basis for one or more reservoirs in a particular parish might be to produce that very result which it is said must not be arrived at.

Before saying a word upon the ground upon which it is sought to distinguish *Reg.* v. *West Middlesex Waterworks Co.* (1), I desire to call attention to the fact that the rating of the Metropolitan Water Board was the subject of an appeal to the London quarter sessions in 1906. The method which is now contended for by the appellants was then adopted, and, on appeal to this Court (2), was approved; the method, namely, of arriving at the rateable value of the whole in the ordinary method by which the rateable value of gasworks, waterworks, railways, or tramways has always been arrived at.

It is said that the decision in *Reg.* v. *West Middlesex Waterworks Co.* (1) is not applicable to this case, because this is not an industrial or profit-bearing or profit-earning concern, and that it is limited by statute in the amount which it can earn, and therefore it is incapable of making a profit to bring it within the class of cases such as *Reg.* v. *West Middlesex Waterworks Co.* (1), where the companies were at liberty to make profits. It seems to me that the decision in *Port of London Authority* v. *Orsett Union* (3) is conclusive that that distinction ought not to prevail. I can find no difference in principle between that case and this. Lord Haldane pointed out that the effect of what had been done was this (4): "The old dock companies carried on business

(1) 1 E. & E. 716.
(2) [1909] 73 J. P. 142.
(3) [1920] A. C. 273.
(4) Ibid. 286.

in order to make profits, and the scheme of the Act of 1908 appears to have been to give their stockholders a surrogatum, in the shape of a new stock which was to take the place of the existing stock, and to return fixed rates of interest in substitution for the shares of profits taken as dividends on their stock by the old stockholders. It is, therefore, to my mind plain that the new Port Authority was in this sense made by the Act a concern which had to carry on a profit-earning business, at all events so far as was required in order to earn profits out of which to pay this so-called interest." Lord Buckmaster said (1): "It is quite true that the hypothetical tenant of such an undertaking as the present must, on the hypothesis, be a tenant who is subject to the restrictions which have been imposed on the carrying on of the undertaking by the Legislature. This may materially affect the rateable value of the hereditament by reason of the fact that such restrictions may impose a limit upon its profit-earning capacity. But the method of application of such profits, however closely defined and regulated they may be, does not mean that they cannot be earned, and consequently that they may not be brought into consideration in determining the rateable value." I think, therefore, that the case cannot be successfully distinguished from *Reg.* v. *West Middlesex Waterworks Co.* (2), and for these reasons I agree that the appeals should be allowed.

ACTON J. I agree, and all I desire to add is this: the test is, as always, what rent the hypothetical tenant would be willing to pay. The argument for the respondents seems, when summarized, to be that because a hereditament is subject to such restrictions as to profit-earning or revenue-producing capacity, that a hypothetical tenant rebus sic stantibus can be expected to pay only a very low rent for it. There must therefore be applied to it, wholly without regard to any such profit-earning or revenue-producing capacity, a principle which will, in the result, show that the hypothetical

(1) [1920] A. C. 303. (2) 1 E. & E. 716.

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tenant would be willing to pay a much higher rent for it. That seems to me to be a non sequitur, and to be contrary to the principles which have been laid down in the various authorities which have been cited to us.

Appeals allowed.

J. S. H.

The Assessment Committee appealed.

Mitchell-Innes K.C., *Hon. Sir Malcolm Macnaghten K.C.* and *W. Hedley* for the Assessment Committee. The only matter of law involved in this case is the question whether the profits basis is, as the Water Board contend, the only method of ascertaining the rent at which their undertaking might reasonably be expected to let from year to year; or whether there is, as the Assessment Committee contend, another permissible basis—namely, the contractor's basis. If the contention of the Assessment Committee is correct the case resolves itself into a question of fact—namely, which is the preferable method? That is a question for the Court of quarter sessions, and that Court has decided in favour of the Assessment Committee. The Divisional Court decided in favour of the Water Board that the profits basis was the only proper basis, but did so by mistaking the effect of *Reg.* v. *West Middlesex Waterworks Co.* (1) and other cases hereafter referred to.

The method adopted by the Water Board is as follows: They have taken the gross receipts of the undertaking for the year ending in March, 1920, amounting to 3,105,649*l.* From this they have deducted a sum of 1,593,287*l.* for working expenses excluding rates. This leaves as net receipts including rates a sum of 1,512,362*l.* From this they deduct for tenant's profits 217,395*l.*, being 7 per cent. of 3,105,649*l.*, the gross receipts, and thus arrive at 1,294,967*l.* as the gross value including rates of the undertaking. Deducting from this sum 287,701*l.* in respect of statutory deductions, they reach a sum of 1,007,266*l.*, representing the rateable value of their

(1) 1 E. & E. 716.

undertaking including the rates thereon. From this they deduct rates at 13*s.* in the £, and so they estimate the rateable value of their entire undertaking at 610,464*l.* These figures are not disputed, if the profits basis is the only permissible method of arriving at the rateable value of the undertaking. The question is, whether there is another permissible method. The Water Board reject any other method which would lead to a rateable value greater than 610,464*l.* The fault in this method becomes apparent when they proceed to distribute the 610,464*l.* between the various parishes. The proper way of doing this, where the undertaking consists partly of directly productive and partly of indirectly productive hereditaments, was laid down in *Reg.* v. *Mile End Old Town Overseers* (1): the indirectly productive portion is first rated as land and buildings with fixtures and machinery attached and deriving some additional value from their being applied to the objects of a water undertaking: see also *Reg.* v. *West Middlesex Waterworks Co* (2); *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (3); *Metropolitan Water Board* v. *Chertsey Union* (4) For these hereditaments the Board or company owning the undertaking "must be assumed to pay adequate remuneration to a contractor for land and fixed capital vested therein, together with the labour and skill requisite for the effective continuance" of the operation of the hereditaments; "and this contractor with the company" —or Board—"would stand in the relation of occupying tenant to the parish, and the part within the parish would be the rateable subject, and the local rateable value would be such sum as would pay the rent of the land and the profit on fixed capital therein"; per Wightman J. delivering the opinion of the Court of Queen's Bench in *Reg.* v. *West Middlesex Waterworks Co.* (2) The proper allowance to be made for interest on capital is a question of fact: per Blackburn J. delivering the judgment of the Court in *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (2), where *Reg.* v. *Mile End Old Town Overseers* (1) and *Reg.* v. *West*

(1) 10 Q. B. 208.
(2) 1 E. & E. 716, 723.
(3) 4 B. & S. 135, 147.
(4) [1916] 1 A. C. 337, 350.

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Middlesex Waterworks Co. (1) were followed. In practice indirectly profitable hereditaments have been rated at 4 per cent. on the cost of the land and 5 per cent. on the cost of the buildings: Ryde on Rating, 4th ed. (1920), p. 243. "The rule is so well established," said Lord Parker in *Metropolitan Water Board* v. *Chertsey Union* (2), "that . . . . though the assessing authority is not legally bound to apply it in all cases, the onus of showing that it ought not to be applied in any particular case probably lies with those who say it is inapplicable." The special cases in the present appeal state that these percentages are reasonable and proper.

Now the so-called rateable value of the Water Board's undertaking—namely, 610,464*l.*—is approximately $2\frac{1}{2}$ per cent. of 24,912,118*l.*, the agreed capital value of the undertaking. The capital value of the indirectly productive portion of the undertaking is 19,670,834*l.* Instead of taking 4 or 5 per cent. of this last figure the Water Board take $2\frac{1}{2}$ per cent., which amounts to 491,771*l.* To this they add rates at 13*s.* in the £, and so arrive at the figure of 811,422*l.* The rateable value, including the rates thereon of the whole undertaking, is 1,007,266*l.* From this they deduct the 811,422*l.* mentioned above. This leaves a balance of 195,844*l.*, which they put forward as the rateable value including rates thereon of the directly productive portion of the whole undertaking. This sum of 195,844*l.* is roughly $6\frac{1}{2}$ per cent. of 3,023,745*l.*, the water rental of the whole undertaking. This explains why in each parish $6\frac{1}{2}$ per cent. of the revenue of the parish is taken as the rateable value (including rates) of the directly productive hereditaments, and why $2\frac{1}{2}$ per cent. of the capital value of the indirectly productive hereditaments in the parish is taken as the rateable value of the indirectly productive hereditaments. If more than $2\frac{1}{2}$ per cent. of their capital value were allowed as the rateable value of the indirectly productive hereditaments, the figure of 610,464*l.*, the supposed rateable value of the whole undertaking, would be exceeded. Thus the indirectly productive hereditaments are not assessed, as they ought to be, independently of profits and on their

(1) 1 E. & E. 716.

(2) [1916] 1 A. C. 337, 361.

proper basis as land and buildings with fixtures and machinery attached and deriving some additional value from their being applied to such purposes as that of a water undertaking, or with any view to the adequate remuneration to a contractor for land and fixed capital invested therein, but are assessed on a scale whose only merit is that it conforms to the figure of 610,464*l*. In other words the contention of the Water Board is that the profits basis is the only basis on which their undertaking is to be rated.

The judgment of the Divisional Court is based upon cases which do not support it. In *Reg.* v. *Mile End Old Town Overseers* (1), the rateable value of the whole waterworks had been already ascertained and the method of ascertaining it had not been challenged. The question before the Court of Queen's Bench was how that rateable value was to be apportioned. In *Reg.* v. *West Middlesex Waterworks Co.* (2) the question was whether the indirectly productive portion of the company's waterworks was rateable at all. It was held that it was rateable, and that its rateable value was to be ascertained on the contractor's basis and without reference to profits. It is difficult to see how this case came to be cited in favour of the profits basis. It is true that it has been repeatedly followed and finally approved in *Metropolitan Water Board* v. *Chertsey Union* (3) in the House of Lords, but that fact tells in favour of the Assessment Committee. In *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (4) the rating authority had begun by estimating the rent which a tenant would give for the whole rateable property of the company. From that they deducted the net rateable value of the works, buildings and lands indirectly contributing to the company's profits, and treated the balance as the net rateable value of the residue of the company's rateable property consisting of mains and pipes lying in different townships, and they then proceeded to apportion the rateable value of the residue so ascertained among the townships. In answer to the company's objection to the

(1) 10 Q. B. 208.
(2) 1 E. & E. 716.
(3) [1916] 1 A. C. 337.
(4) 4 B. & S. 135.

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mode on which the rateable value of the whole undertaking had been arrived at, the Court held that, assuming proper allowances had been made for tenant's profits and interest on capital, and that the proper value had been put upon the stations, works and buildings, "a proper mode"—not the proper mode, or the only proper mode, or the best mode—had been adopted of obtaining the rateable value of the remaining property. Other methods are in nowise precluded: *Port of London Authority* v. *Orsett Union.* (1) The method adopted was one of various modes appropriate or proper for ascertaining the rent of the property. This was only following *Reg.* v. *West Middlesex Waterworks Co.* (2) The real question in *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (3) was upon the second objection of the company—namely, that no distinction had been made between those hereditaments which directly contributed and those which indirectly contributed to the profits of the undertaking. Avory J. in his judgment in the Divisional Court cites Lord Atkinson in *Metropolitan Water Board* v. *Chertsey Union* (4) as upholding the profits basis; but the decision only declares how that basis, assuming it is adopted, should be worked out. The next case relied on by Avory J. is *Great Central Ry. Co.* v. *Banbury Union* (5), but the two formulæ did not come into conflict in that case. It was proposed to apply the contractor's basis to a small portion of the company's railway and the profits basis to the rest of their system. The Court merely decided that the two methods together could not be adopted. *Port of London Authority* v. *Orsett Union* (6) decided that where the profits basis is adopted an allowance should be made for tenant's profits.

The profits basis is at its best a rough method of arriving at the value of the rateable hereditaments of an ordinary commercial undertaking earning profits and existing for that purpose. The annual profits of such a concern bear some

(1) [1920] A. C. 273, 281.
(2) 1 E. & E. 716.
(3) 4 B. & S. 135.
(4) [1916] 1 A. C. 337, 349.
(5) [1909] A. C. 78.
(6) [1920] A. C. 273.

relation to the rent a hypothetical tenant will be disposed to pay as rent for the hereditaments with a view to earning the profits. But when an undertaking like that of the Water Board is in question there could hardly be a more fallacious guide to the value of its hereditaments than its annual profits. The Water Board is not a commercial undertaking; it exists not for the purpose of earning profits, but with the object of avoiding any profit; it exists for the purpose of supplying the public with water at the smallest possible cost; it is discouraged from having any surplus of revenue over expenditure, and if there should be any surplus in hand the Board must lower the rate at which they supply water. This is the effect of s. 15 of the Metropolis Water Act, 1902 (2 Edw. 7, c. 41), s. 8 of the Metropolitan Water Board (Charges) Act, 1907 (7 Edw. 7, c. clxxi.), and ss. 7 and 8 of the Metropolitan Water Board (Charges) Act, 1921 (11 & 12 Geo. 5, c. xciv.).

Now the figure which the Water Board put forward as the rateable value of their entire undertaking is 610,464*l.*, and that is based upon the difference between their gross receipts 3,105,649*l.* and their working expenses 1,539,287*l.* The excess of gross receipts over working expenses is due to their obligation to pay interest on their stock and provide a sinking fund for the payment of their debt. It follows that their rateable value is controlled by and made to depend upon the amount of their debt; its amount is fixed by the amount necessary to pay off their debt. The smaller their debt, the smaller the rateable value of their undertaking, and consequently the smaller the rateable value of the indirectly productive portion. If there were no debt, and the receipts and expenses of the undertaking balanced each other, the rateable value of the indirectly productive portion would be nothing, even though that portion occupied the most valuable site in the parish. On the other hand the greater the debt of the Water Board the higher is the rateable value. Upon this basis the rateable value of a house would vary directly with the amount of the occupier's indebtedness to his banker.

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It is said that where the profits of an undertaking are restricted by statute the restricted profit is to form the basis of rateability, and that this consideration negatives the contractor's basis as a means of arriving at the rateable value, and for these propositions *Worcester Corporation* v. *Droitwich Assessment Committee* (1) is the first case relied on. That case followed *Liverpool Corporation* v. *Wavertree Overseers.* (2) Both cases dealt with the rating of waterworks undertaken by the corporation in each case, subject to restrictions upon profits like those imposed upon the Water Board. The question was whether the hypothetical tenant was to be subject to the same restrictions, and the Court held that he was. This decision was followed in *Peterborough Corporation* v. *Stamford Union* (3), where the corporation had purchased land at Wilsthorpe within the Stamford Union and spent on waterworks in Wilsthorpe 17,500*l.* The receipts of the corporation for the year in question were less than their expenses. It was held that the works in Wilsthorpe were not to be rated on a contractor's basis, but upon a profits basis, and that the rateable value of these works, on which 17,500*l.* had been spent, was nothing. These three cases were decided upon a fallacy which was exploded in *Reg.* v. *London School Board* (4)—namely, that the corporation, board, or company occupying the works and bound to carry on the concern was not to be included among possible hypothetical tenants. The *London School Board* case (4) was affirmed in the House of Lords in *London County Council* v. *Erith Overseers* (5), and it is now well settled that the actual occupiers are to be included and that the rateability of the works depends not upon their being profitable but upon their being valuable: *West Kent Main Sewerage Board* v. *Dartford Union Assessment Committee* (6); not upon what the occupiers can make out of them, but upon what they are prepared to give by the year for the use of them in order to discharge their duty, if they are under a duty, to supply water, gas,

(1) 2 Ex. D. 49.
(2) 2 Ex. D. 55, note 1.
(3) 31 W. R. 949.
(4) (1886) 17 Q. B. D. 738.
(5) [1893] A. C. 562.
(6) [1911] A. C. 171.

electricity or whatever it may be. And there can be little doubt that if *Reg.* v. *London School Board* (1) had been decided before instead of after *Liverpool Corporation* v. *Wavertree Overseers* (2); *Worcester Corporation* v. *Droitwich Assessment Committee* (3); and *Peterborough Corporation* v. *Stamford Union Assessment Committee* (4), those three cases would have been decided differently. And it is very important to observe that in *London County Council* v. *Erith Overseers* (5) Lord Herschell L.C., after saying that in rating hereditaments, which are enhanced in value by their connection with profit-bearing undertakings, the profits basis is properly applied, but that then any restriction imposed on the profit-earning capacity must be considered, goes on to say: "I do not think this class of cases affords any guide to the assessment of such hereditaments as those with regard to which your Lordships have now to lay down the proper principle of rating"—namely, outfall works, pumping stations, and hereditaments not directly profitable—implying that in these cases some basis other than the profits basis must be applied; and in *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (6) the Lord Chancellor explained that his words were confined to profit-earning undertakings, and Lord Davey (7) expressed the same view. It cannot be denied that a reasonable percentage on the capital value of a hereditament, which earns no profit, but which the occupier is bound to provide and maintain, is some indication of what the occupier would be prepared to give by the year for the hereditament.

But it is really not necessary to weigh the merits of one basis against those of the other. That is the province of quarter sessions. As Lord Esher M.R. said in *North and South Western Junction Ry. Co.* v. *Brentford Union* (8): "What the Courts have done over and over again is to say that the particular mode of estimating the rateable value adopted in the particular case before them was not under the

(1) 17 Q. B. D. 738.
(2) 2 Ex. D. 55, note 1.
(3) 2 Ex. D. 49.
(4) 31 W. R. 949.
(5) [1893] A. C. 562, 592.
(6) [1895] A. C. 136, 149.
(7) [1895] A. C. 153.
(8) 18 Q. B. D. 740, 754.

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circumstances contrary to the rule of law laid down by the statute" ;—i.e., the Parochial Assessments Act, 1836—"but I do not think they meant to say that such a mode of applying the rule so laid down was necessarily and in all such cases the only correct mode. The ingenuity of man may discover some fresh mode of adapting the rule as laid down by the statute to the circumstances of new cases, and it is impossible for a Court to say beforehand that no other mode of applying the statutory rule than that employed in the case before them can be correct." . . . . These words were fully affirmed in the House of Lords (1), where Lord Watson said: "There are principles of valuation which depend on purely legal considerations, and any misapplication of these is open to correction by the Courts. But there are also certain so called principles of valuation, which are simply formulæ (2) for arriving at the solution of questions of fact, which have commended themselves to valuators of experience. There may be several alternative formulæ of that kind, all of them capable of leading to a just and reasonable conclusion. It is for the arbitrator, who is constituted the judge of the facts, to determine for himself which rule of that kind he will accept for his guidance." If "quarter sessions" be substituted for "arbitrator," which cannot be objected to, the only remaining question is whether the contractor's basis is one of the formulæ referred to by Lord Watson. It is one of those formulæ. With all respect to the judgment of Manisty and A. L. Smith JJ. in *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union* (3), that method has been recognized in *Chorlton-upon-Medlock Overseers* v. *Chorlton Union* (4); *Reg.* v. *London School Board* (5); *Liverpool Corporation* v. *Llanfyllin Union* (6); *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (7); *New River Co.* v. *Hertford Union* (8); *Liverpool Corporation* v. *Chorley*

(1) (1888) 13 App. Cas. 592, 594.

(2) This expression was cited with approval by Lord Loreburn in *Great Central Ry. Co.* v. *Banbury Union* [1909] A. C. 78, 85.

(3) (1885) 16 Q. B. D. 585, 596; C. A. (1886) 17 Q. B. D. 384.

(4) 51 L. J. (Q. B.) 458.

(5) (1885) 55 L. J. (M. C.) 33; (1886) 17 Q. B. D. 738.

(6) [1899] 2 Q. B. 14.

(7) [1901] A. C. 175.

(8) [1902] 2 K. B. 597.

Union Assessment Committee (1); *Metropolitan Water Board* v. *Chertsey Union* (2), per Lord Parker; and *Port of London Authority* v. *Orsett Union* (3), per Lord Dunedin. In *North and South Western Junction Ry. Co.* v. *Brentford Union* (4) and *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (5) it was held that the choice between two of these formulæ involves mere matter of fact and not of law. It cannot be suggested that the attention of quarter sessions was not drawn to the proper question of law, because both sides were insisting that the object was to ascertain the rent at which the premises might reasonably be expected to let from year to year after making the statutory deductions; the difference between them was which basis in the circumstances was the best method of arriving at that result. The Court of quarter sessions decided in favour of the contractor's basis. Their decision ought to have ended the case.

Tyldesley Jones K.C., *Hon. S. O. Henn Collins* and *F. E. Skone James* for the Water Board. Two questions of law are raised by this appeal: (1.) Was the assessment committee bound to apply the profits basis? If not, (2.) were they entitled to apply the contractor's basis? Of course if the profits basis is obligatory the second question does not arise; but if the profits basis is merely permissible, then the second question must be faced. The Water Board contend that the profits basis is obligatory, and that even if it is only permissible the contractor's basis is not permissible.

The hereditaments forming part of a water undertaking must be rated on the profits basis. In this respect there is no difference between municipal and trading undertakings or between undertakings which produce a profit and those which produce a revenue, but may not make a profit. These hereditaments derive their value from their connection with the undertaking, whether it produces a profit or a revenue, but no profit. The greater part of the works may be situate in one parish; the greater part of the water rates may be

(1) [1912] 1 K. B. 270, 293.
(2) [1916] 1 A. C. 337, 360.
(3) [1920] A. C. 273, 295.
(4) 13 App. Cas. 592.
(5) [1901] A. C. 175.

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paid in another; but those facts cannot really affect the respective rateable values of the hereditaments in the two parishes. The difficulty of rating these hereditaments on some system that was reasonable and equitable came to a crisis in *Reg.* v. *Mile End Old Town Overseers* (1), to which *Reg.* v. *West Middlesex Waterworks Co.* (2) is a corollary, and those two cases have been treated by every Court in this country from the House of Lords downwards as laying down the law relating to the valuation of waterworks for the purposes of rating from the year 1847 or 1859 to the present time. The rateable value of the whole undertaking is ascertained on the basis of receipts and expenditure—the profits basis: see para. 7 of the Water Board's statement of facts in the special case. To ascertain the rateable value on any other basis would throw into confusion the rating of these undertakings. This rateable value so ascertained is the ground work and subject matter of all the subsequent calculations. This is what has to be distributed among the various parishes, and it is for the purpose of effecting an equitable distribution, and for that purpose alone, that the contractor's basis finds any place in the discussion.

Now when the rateable value of the whole undertaking, assessed on the profits basis, is beyond question sufficient to allow to the indirectly productive portion a rateable value equal to 4 or 5 per cent. of its capital value, there is then no necessity to estimate the rateable value of the whole undertaking. And so it was in *Reg.* v. *West Middlesex Waterworks Co.* (2) But Wightman J. in that case uttered a solemn warning against allowing the contractor's basis to be applied to its full extent where the result would be that the rateable value of the whole, assessed on the profits basis, would be exceeded; and here the learned judge was supported by the House of Lords in *Great Central Ry. Co.* v. *Banbury Union.* (3) To avoid this inconsistency, he said (4): "The Court must take into its consideration at once all the separate rates"—i.e., in the separate parishes—"as so many claims

(1) 10 Q. B. 208.
(2) 1 E. & E. 716.
(3) [1909] A. C. 78, 87.
(4) 1 E. & E. 722.

upon one given fund"—namely, the rateable value of the whole assessed on the profits basis. And if there is any doubt whether, by allowing 4 or 5 per cent. on the capital value of the indirectly productive portion, the rateable value of the whole undertaking assessed on the profits basis will be exceeded, then it is necessary to ascertain the rateable value of the whole on that basis and to see that it is not exceeded. *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (1) followed the two former cases. There the gas company, who were appealing from the assessment, proposed a very elaborate scheme for valuing their premises and works in the townships where they were situate by comparing them with buildings and machinery in the town of Sheffield. They suggested that stations used for manufacturing should be considered as land and buildings with machinery affixed in Sheffield, and that the rentals of such lands and buildings in Sheffield should be compared with the rentals of the company's stations; and that their pipes and mains should be divided into those which must be laid where they were and those which might be laid elsewhere, and that the land used for pipes of each class should be valued with a due regard to the difference between the classes. The rating authority had adopted the principle of *Reg.* v. *Mile End Old Town Overseers* (2) with one difference; having ascertained by reference to the net receipts the net annual value of the whole of the company's works, they deducted the net annual value of the indirectly profitable portion, and allotted the balance between the townships into which their pipes extended according to extent of the pipes, but without reference to the question whether they were directly or indirectly productive. The Court, being asked whether the method adopted by the company or that adopted by the overseers was right, held that the method applied in *Reg.* v. *West Middlesex Waterworks Co.* (3) must be adopted, not only on the point of difference between directly and indirectly profitable hereditaments, but wholly and in relation to the entire process of rating water and gas

(1) 4 B. & S. 135. (2) 10 Q. B. 208.
(3) 1 E. & E. 716.

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undertakings. Rightly understood that case decided that the profits basis is the proper basis. The rateable value of the whole undertaking must first be ascertained; the value thus ascertained must be apportioned between the various parishes into which the undertaking extends. This is the only way to ensure that the sum of the rateable values of the various hereditaments does not exceed the rateable value of the whole undertaking: *Reg.* v. *West Middlesex Waterworks Co.* (1), affirmed in the House of Lords in *Great Central Ry. Co.* v. *Banbury Union.* (2) The initial valuation of the undertaking as a whole is essential. It must be effected before the values of the component parts are approached. It is not permissible to value the various hereditaments without reference to the value of the undertaking as a whole. The Assessment Committee would begin by valuing each of the hereditaments and would arrive at the rateable value of the whole undertaking by adding together the values of the component parts arrived at, and would then distribute the value of the whole so arrived at among the component parts. That is not to value the undertaking as one hereditament. Then how is the undertaking, as one hereditament, to be valued? In *Reg.* v. *Mile End Old Town Overseers* (3) the hereditaments in question were all directly productive; in *Reg.* v. *West Middlesex Waterworks Co.* (1) the hereditaments were all indirectly productive; in *Sheffield United Gas Light Co.* v. *Sheffield Overseers* (4) some of the hereditaments were directly and others indirectly productive. In all three cases the same method was applied; the undertaking as a whole was valued on the profits basis. Then suppose the rateable value of the undertaking as a whole valued on the profits basis was 5000*l.*, and the value of the indirectly productive portion assessed on the contractor's basis came to 6000*l.*, it is plain the 6000*l.* could not be admitted. If this last figure were 4500*l.* instead of 6000*l.*, then the question would arise whether the tenant of the whole would pay one landlord a yearly rent of 4500*l.* for the indirectly productive portion and apply

(1) 1 E. & E. 716.
(2) [1909] A. C. 78, 87.
(3) 10 Q. B. 208.
(4) 4 B. & S. 135.

only 500*l.* as rent to another landlord for the directly productive portion. The answer to that question, that is to say the apportionment of rent between the directly and the indirectly productive portions, would depend upon matters of fact. In the present case the actual apportionment, assuming the profits basis is the proper basis for valuing the whole undertaking, is not disputed. The argument for the Assessment Committee is that a system which upon apportionment allows to the indirectly productive portion only 2½ per cent. of its capital value, must be a wrong system. But the amount allowed to each must depend on circumstances. The subject of valuation is a hereditament already in existence, and the test of its value is, not what a contractor would like to get, but what a tenant is willing to give, for it: *London County Council* v. *Erith Overseers* (1); *Poplar Assessment Committee* v. *Roberts*. (2) "The hereditament as it stands, with all its privileges, opportunities and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament" is what has to be valued: *Port of London Authority* v. *Orsett Union* (3), per Lord Buckmaster. How then can any portion of it be valued by the fixed and rigid measure of the contractor's basis? No doubt assessment committees have been averse to the profits basis as a method of valuing undertakings whose profits are restricted by statute, because the restriction involves a diminution in rateable value. In their view the value of the hereditament was the same whether it was in the hands of a free private owner or of a restricted corporation. In *Worcester Corporation* v. *Droitwich Assessment Committee* (4) the assessment committee had acted on this view. The corporation contended for the profits basis with all its consequences, including a reduction in rateable value resulting from a restriction on profits. The assessment committee contended that the hypothetical tenant should be one whose capacity to earn lawful profits was unrestricted. The Court upheld the contention of the corporation. In

(1) [1893] A. C. 562, 588.
(2) [1922] 2 A. C. 93.
(3) [1920] A. C. 273, 305.
(4) 2 Ex. D. 49.

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Peterborough Corporation v. *Stamford Union* (1) the receipts of a water undertaking for a certain year were less than the sum of its expenses of working and maintenance, interest on its loans, and its receipts. Computed on the profits basis the rateable value of works in a certain parish erected at a cost of 17,500*l.* would be nothing. In these circumstances the assessment committee contended that these works should be valued on the contractor's basis; but the Court, following *Worcester Corporation* v. *Droitwich Assessment Committee* (2), held that this mode of assessment was "altogether wrong," and that inasmuch as a tenant would obviously give nothing as rent for the works, their rateable value was nothing. The assessment committee appealed; and the Court of Appeal dismissed the appeal (3) "on the ground that the question at issue between the parties was concluded by authority." The reports in the Law Journal (4) and the Weekly Reporter (5) show that the "authority" was *Worcester Corporation* v. *Droitwich Assessment Committee.* (2) In *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union* (6) the matter in dispute was the rateable value of hereditaments forming part of a water undertaking with powers very like those of the Water Board and subject to similar restrictions. The assessment committee endeavoured to support the existing assessment on the ground that adequate remuneration to a contractor for the works in the union would not be less than the assessment. They further contended that the rateable value of the hereditaments was increased by the fact that the waterworks board were empowered to make a public water rate for the purpose of discharging expenses of maintaining and repairing so far as the water rents were insufficient for that purpose. The Divisional Court (Manisty and A. L. Smith JJ.) held that this latter contention of the assessment committee was correct; but expressed the clear opinion (7) that "what may happen to be the adequate

(1) 31 W. R. 949.
(2) 2 Ex. D. 49.
(3) (1883) 12 Q. B. D. 1.
(4) 53 L. J. (M. C.) 33.
(5) 32 W. R. 548.
(6) 16 Q. B. D. 585.
(7) 16 Q. B. D. 596.

remuneration to a contractor for erecting the appellants' works, is not the true measure of the net rateable value of their premises," that it was not the test applied by the Parochial Assessment Act, and had never to their knowledge been recognized in a Court of law; "and," the Court added, "it is obviously so unreliable and fallacious . . . . that in our judgment no reliance whatever can be placed upon it." The waterworks board appealed (1) from the decision concerning the public water rate, and that decision was affirmed—it was explained and the principle was applied in *Metropolitan Water Board* v. *St. Marylebone Assessment Committee* (2)—but there was no cross-appeal upon the point relating to the contractor's basis as a method of valuation. In *Merthyr Tydfil Local Board* v. *Merthyr Tydfil Assessment Committee* (3) the contention of the Assessment Committee in the present case was advanced by the respondents (the assessment committee in that case) and repelled by the Court. *West Bromwich School Board* v. *West Bromwich Overseers* (4) does not really affect the principle, rightly understood, of *Peterborough Corporation* v. *Stamford Union* (5) or of *Worcester Corporation* v. *Droitwich Assessment Committee.* (6) Finally in *Great Central Ry. Co.* v. *Banbury Union* (7) the contractor's basis was disapproved in the House of Lords. On the other hand the profits basis has been recognized often in the Court of Appeal and in the House of Lords as the basis upon which to ascertain the rateable value of the whole undertaking. It is recognized in *London County Council* v. *Erith Overseers* (8); *Hull Docks Co.* v. *Sculcoates Union* (9); *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull* (10); *Port of London Authority* v. *Orsett Union* (11); and these cases lay it down that for rating a hereditament which is enhanced in value by reason of its connection with a profit-bearing undertaking "the profits

(1) 17 Q. B. D. 384.
(2) [1923] 1 K. B. 86.
(3) [1891] 1 Q. B. 186.
(4) 13 Q. B. D. 929.
(5) 31 W. R. 949; 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 32 W. R. 548.
(6) 2 Ex. D. 49.
(7) [1909] A. C. 78.
(8) [1893] A. C. 562, 592.
(9) [1894] 2 Q. B. 69, 81.
(10) [1895] A. C. 136, 149.
(11) [1920] A. C. 273, 284.

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earned, and the share of profits attributable to any particular hereditament, have to be taken into account." In short whenever the Courts have been invited to choose between the profits basis and the contractor's or any other competing basis they have chosen the profits basis and rejected the other. It is said that Lord Herschell in the *Erith* case (1) recognized some distinction between those undertakings which can and do earn profits, and those which earn revenue but are prohibited from earning profits. But no such distinction exists. It was formerly thought that an undertaking carried on for the benefit of the public was not rateable; but that opinion is no longer tenable. The undertaking was held to be rateable in *Mersey Docks and Harbour Board* v. *Cameron*. (2) The measure and extent of its rateability were declared in *Port of London Authority* v. *Orsett Union*. (3) Lord Birkenhead L.C. says (4) that, the actual rent of such a hereditament being available as a test of its value, a very usual method had been adopted—namely, "The amount of the gross receipts is ascertained, and from such amount are deducted the expense of earning such receipts, the deductions provided for by statute, interest on tenant's capital and the estimated amount of tenant's profit"—in other words, the profits basis. There is no material distinction, in respect of the capacity to earn profits, between the Port of London Authority and the Metropolitan Water Board; so any supposed difference between profit-bearing and revenue-producing concerns which might be extracted from the words of Lord Herschell in the *Erith* case (1) is shown to be unsubstantial by the judgment of Lord Birkenhead in *Port of London Authority* v. *Orsett Union*. (3) But in truth there is no foundation for the contention that Lord Herschell in *London County Council* v. *Erith Overseers* (5) recognized any distinction between water undertakings which earn profits and those which produce a revenue, but are not permitted to earn profits. The Lord Chancellor's words referred to the

(1) [1893] A. C. 562.
(2) (1865) 11 H. L. C. 443.
(3) [1920] A. C. 273.
(4) [1920] A. C. 281.
(5) [1893] A. C. 562, 592.

cases which had been cited in argument, and they included not only *Reg.* v. *West Middlesex Waterworks Co.* (1), where the water company was unrestricted in its profits, but also *Worcester Corporation* v. *Droitwich Assessment Committee* (2); and *Peterborough Corporation* v. *Stamford Union* (3); and *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union* (4); in each of which the corporation or board, as the case may be, was restricted in the matter of profits. Lord Herschell clearly intended to except both kinds of water undertakings from the rules applying to pumping stations and outfall sewers, where value and not profit is the test, and to state his view that water undertakings, both profit bearing and revenue earning, were to be assessed upon the profits basis.

Mitchell-Innes K.C. in reply. It is clear from the argument for the Water Board that the question of law on this appeal is Aye or No, is the profits basis the only basis for rating the Water Board's undertaking? If any other basis is permissible the whole argument falls to the ground, for it stands on the foundation that the profits basis is the only basis. As soon as the figure of 610,464*l.* has been reached as the total rateable value, the profits basis has been adopted. The argument not only concedes, it asserts that the rateable value of a hereditament is what a tenant is prepared to give for it; but when the question is asked, What will a tenant be prepared to give? the answer of the Water Board is, no more than the profits basis permits. That is to beg the question. But this is not the only assumption the Water Board make in their own favour. They assume that if the merits of the profits basis had been canvassed in the *Mile End Old Town* case (5) and in the *West Middlesex Waterworks* case (1) it would have been established in preference to all others. But in each of those cases the profits basis had already been adopted, and the only question before

(1) 1 E. & E. 716.
(2) 2 Ex. D. 49.
(3) 31 W. R. 949.
(4) 16 Q. B. D. 585.
(5) 10 Q. B. 208.

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the Court was how the rateable value, so found, was to be apportioned. When the Assessment Committee contend that there is something amiss with the profits basis when it attributes to the indirectly productive hereditaments a rateable value which is only $2\frac{1}{2}$ per cent. of their capital value, by way of adequate remuneration to a contractor, they are not convinced by the answer that the impugned basis allows of no more; and when they are told that the *West Middlesex Waterworks* case (1) warrants this answer they are still unappeased, seeing that in that case the indirectly productive hereditaments were valued irrespectively of profits, while in this case the valuation depends entirely on profits. Why is $2\frac{1}{2}$ per cent. on the capital value taken as the rateable value of these hereditaments? Because the rateable value of the whole undertaking assessed on the profits basis is $2\frac{1}{2}$ per cent. of its capital value. With regard to the *Sheffield* case (2), the question before the Court of Queen's Bench was a pure question of fact stated in the form of a special case and s. 11 of the Quarter Sessions Act, 1849, commonly known as Baines' Act, under which simple questions of fact may be submitted to the Court in its advisory capacity, recognized by Lord Halsbury L.C. in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee*. (3) The same applies to the *Dewsbury and Heckmondwike Waterworks* case (4) and the *Stamford* case. (5) The profits basis is only one of all possible ways of arriving at the rateable value of a hereditament. It has no statutory authority. No doubt it is in ordinary cases a sound way of fixing the true value, and when adopted by quarter sessions, "the proper judges of this question of fact," Courts of law have repeatedly allowed it, "though Courts of law have never said that must be adopted": per Lord Loreburn, *Great Central Ry. Co.* v. *Banbury Union*. (6)

Cur. adv. vult.

(1) 1 E. & E. 716.
(2) 4 B. & S. 135.
(3) [1901] A. C. 175.
(4) 16 Q. B. D. 585; 17 Q. B. D. 384.
(5) 31 W. R. 949; 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 32 W. R. 548.
(6) [1909] A. C. 78, 85.

April 29. The following written judgments were delivered :—

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BANKES L.J. This appeal has been fully and elaborately argued. It raises a question of rating law of great and far reaching importance. In substance it is an endeavour to set aside a long established practice in relation to the rating of waterworks and gasworks, whether owned by public authorities or by trading bodies, and to substitute an assessment upon capital values as suggested by Mr. Ryde in his well known work on Rating, 4th ed., p. 401.

The matter comes before this Court on a special case stated by the Court of quarter sessions for the county of Middlesex, and by way of appeal from the Divisional Court. The special case, para. 2 (*d*), states : "The capital value of the hereditaments in the parish had been agreed between the parties and the question which the Court were asked to determine and determined resolved itself into one of principle, videlicet : What is the proper method or basis for assessing in the year 1920 the portion within the parish of Teddington of the undertaking of the appellants, whether it should be upon (*a*) the profits basis system or (*b*) upon a percentage on structural value."

In the following paragraphs of the special case the rival contentions of the parties are set out, and after stating that the Court of quarter sessions was of opinion that the contentions of the Assessment Committee, the present appellants, were correct, the question for the opinion of the Court is stated to be whether the determination of the quarter sessions was right in law. What in substance the Court of quarter sessions was asked to decide was whether of the two alternative methods contended for it was open to the appellants to select the one which suited their particular circumstances best, or whether they were not bound in law to adopt the method contended for by the Water Board. If the appellants' contention is to prevail a rating authority will naturally select the method or basis which produces the highest assessment of that portion of the undertaking which lies

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within their area, and in deciding whether the circumstances justify the selection a Court of quarter sessions may very well come to its decisions upon pure questions of fact. If, however, the Water Board's contention is correct, that of the two alternatives the one they contend for is the one which the appellants are bound to adopt, then in my opinion a clear question of law is raised, which must be decided before any question of fact is reached. The contention therefore of the appellants that the decision of quarter sessions was a decision upon the facts and not upon the law in my opinion fails.

It is frankly admitted by the appellants' counsel that the appellants are by the present proceedings attempting to depart from what has hitherto been the accepted practice in reference to the rating of waterworks and gasworks undertakings, and are seeking to establish the principle that a rating authority has an option where the hereditaments to be rated are occupied by a public authority to decide whether it will adopt the profits basis, or the contractors' basis, on which to arrive at the gross and rateable value of the property of the undertaking situate within its area. In my opinion, this contention is wrong both in principle and upon authority.

On the question of principle it is, I think, clearly established that in the case of such undertakings as railways, gasworks, or waterworks whose property and plant may be situate within the areas of many different rating authorities, some basis must be adopted which will protect the occupiers from being rated beyond the rateable value of the whole undertaking taken together, and that it is the duty of the Court to afford the occupiers the necessary protection. The rule laid down by Wightman J. in the *West Middlesex* case (1) has been constantly referred to and approved in later cases. What the learned judge said was this: "If a tenancy of each parochial part be assumed according to this hypothesis, then, although each parish rates separately upon its own estimate of the value of the part lying within it, and the law gives no

(1) 1 E. & E. 716, 722.

power of making all the parishes co-operate in rating the several parts lying in each, nevertheless this Court is bound to protect the occupier of such an apparatus from being rated beyond the rateable value of the whole taken together; and it is in reference to this protection that the Court must take into its consideration at once all the separate rates, as so many claims upon one given fund, and must apportion that fund, bearing in mind that every addition to the rateable value assigned to one parish must be a subtraction from the rateable value which might be given to some other parish." It will be noticed that the learned judge gives as the reason why the occupier needs the protection of the Court the fact that the law gives no power of making all the parishes co-operate in rating the several parts lying in each, and that in order to afford the necessary protection the Court must take into its consideration at once all the separate rates as so many claims upon one given fund, and must apportion that fund.

Assessment upon the profits basis is an obvious way of arriving at the fund which has to be apportioned, and on principle is, in my opinion, the only way by which it can be arrived at, because it is only by proceeding on that basis that in practice the fund can be ascertained which has afterwards to be apportioned and the necessary protection to the occupiers can be afforded. If the present appellants are at liberty to select the basis which suits them best, other rating authorities through whose areas the works of the Water Board pass must have the same right. Such a result must end in chaos and render the adoption of any uniform system impossible. The decision of the House of Lords in the *Banbury* case (1) appears to establish that the contention of the present appellants is wrong in principle. The dispute in that case had reference to a portion of a line of railway lying within the parish of Wardington. The railway company contended that the assessment should be made upon the generally accepted net earnings basis. The assessment committee contended that under the special circumstances of the case

(1) [1909] A. C. 78.

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they were entitled to assess the line upon what was the equivalent of the contractors' basis. The difference in the rateable value was very considerable. According to the railway company's method it would be 102*l.*, according to the assessment committee's method it would be 789*l.* The question raised by the special case was whether the appellants' contention or the respondents' contention was right. The Divisional Court decided in favour of the railway company. (1) The Court of Appeal (2) reversed that decision, and accepted an argument for the assessment committee which was in substance the argument presented to this Court by the appellants. In the argument I find Mr. Ryde contending (3) that upon the authorities two methods of assessment were open to his clients, that the parochial principle was not the only principle which could be applied, and that the choice of principles was for the Court of quarter sessions, and that there was no ground for any appeal. The Court, consisting of Vaughan Williams, Farwell and Buckley L.JJ., accepted the argument. Vaughan Williams L.J. says (4): "The determination of the question is, prima facie, a question of fact; and so long as the overseers, who have to decide the question of fact, do not include as an element of consideration matters that ought not to be included, or do not exclude matters that ought to have been included, the Court leaves a discretion in the overseers as to the method which they will apply in the particular valuation." Farwell L.J. says (5): "Is it possible for the Court to say that the rating authorities were wrong in taking into consideration the cost, and the interest on such cost, in ascertaining that which the hypothetical tenant (including amongst the class of hypothetical tenants this railway company) would be willing to give for something which is added on to its original railway by way of an annexe to connect it with another main railway for the purpose of getting through traffic down to Southampton? Is it possible for us to say

(1) [1906] 1 K. B. 597.
(2) [1907] 1 K. B. 717.
(3) [1907] 1 K. B. 720.
(4) [1907] 1 K. B. 723.
(5) [1907] 1 K. B. 731, 732.

that it is to be excluded altogether, and is a matter which should not have been taken into consideration at all? I have considered the special Act, and I think that in the hands of the Great Central Company this is a separate undertaking, an annexe to, and not an integral part of, the main line; so that for the purposes of this question we are dealing with a small, separate undertaking which the Great Central Railway has thought it worth its while to acquire, and to pay interest on the purchase money advanced by the Great Western Company for making it. If the question had been indeed that which the Divisional Court appear to have thought it was, I should agree with what the Lord Justice has said, that it would be obviously impossible to say that the rate of interest was conclusive as to the amount which the hypothetical tenant would pay. But that is not the question. The question is whether it is not a matter which they are entitled to take into consideration. In my opinion it is obviously such a matter, and I do not myself see that any injustice is done." Buckley L.J. says (1): "The other point of principle is this: That assuming that the rating authority is going to proceed upon the parochial principle, thinking that to be the right one, still it remains that the rateable value within the parish may depend on matters outside the parish, that the rating authority may consider, and may properly come to the conclusion, that in applying the parochial principle it is not the earnings within the parish which conclude the matter, but that they are entitled to add in the facts of the case, that the land within the parish has a larger value, because it creates traffic and profit which arise outside the parish." The House of Lords (2) reversed this decision, and upon grounds which in my opinion are directly applicable to the present case. In the first place Lord Loreburn, who presided, dealt with the question whether the special case raised a question of law and, having disposed of that, he proceeds to deal with the case as one in which the assessment committee were seeking to depart from the usually accepted formula, and he says that this should not

(1) [1907] 1 K. B. 735. (2) [1909] A. C. 78.

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be done without good reason. He then proceeds to decide the case upon the principle laid down by Wightman J. in the *West Middlesex* case. (1) He says (2): "When the method I have described is applied the true view seems to lie between these extremes. Each section is regarded as a profit-earning part of the system to which it belongs; each section is indispensable to the working of the system; and I think the resulting inquiry is, if the whole system were to be let at once, though it be in separate sections, how much of the rent that a tenant would give for the whole is applicable to the particular section which is to be assessed? That depends on profit earning. Even if there were a special value in this Banbury branch line which could be considered in making the assessment, I do not see how it can be proper to measure that special value by the cost of construction or its annual equivalent, the interest payable on that cost," and further on (3): "It would be practicable, though I think it would be wrong, to rate every section of a line on the annual equivalent of its cost. But I do not think it is even practicable to adopt a mixed calculation based partly on profit earning and partly on cost. As Wightman J. said in *Reg.* v. *West Middlesex Waterworks Co.* (1), the Court is bound to protect the occupier from being rated beyond the rateable value of the whole apparatus taken together; and that could not be done under the mixed method adopted in this case. Accordingly I think evidence of the interest on cost of construction was inadmissible." Lord Dunedin, after stating that he had risen from a repeated consideration of the numerous authorities quoted with a feeling akin to despair, says (4): "This at least I think is clear, that no system of valuation will be satisfactory which does not treat a railway as a whole, and then proceed to apportion that whole for the purposes of rating among the parochial areas in which it has its local habitation." The reasons given for the final decision of the *Banbury* case (5) in the House of Lords are, in my opinion, directly applicable

(1) 1 E. & E. 716.
(2) [1909] A. C. 86.
(3) [1909] A. C. 87.
(4) [1909] A. C. 88.
(5) [1909] A. C. 78.

to the present appeal. If I understand Mr. Mitchell-Innes aright he does not dispute that whatever system is adopted for arriving at the rateable value of the Water Board's undertaking it must be a uniform system, that is to say, one which is not only accepted and adopted by the rating authorities of every parish in which any portion of the Water Board's undertaking is situated, but is approved on any appeal to them by every Court of quarter sessions which has jurisdiction in the matter. He contends that every interested rating authority, and every Court of quarter sessions, will accept and follow any decision of this Court in his favour. I cannot accept that contention. A decision in his favour will bind no one except the rating authorities parties to these appeals. To all the other rating authorities it will be an intimation that they are at liberty to choose between the two methods contended for by the parties to these appeals, and to adopt the one which upon their particular facts suits their particular interests best. To permit such a state of things appears to me to be flying in the face of the House of Lords' decision in the *Banbury* case (1), and affords a sufficient justification for saying that the contention of the appellants is opposed to established principle.

Upon the authorities also I think that the appellants' contention fails. Considerable argument was addressed to us upon the question of what the well known cases, the *Mile End* case (2) and the *West Middlesex* case (3), really did decide. It is, I think, probably true to say that in neither of those cases did the Court actually decide that the profits basis was the one and only correct basis on which to arrive at a valuation of a waterworks or gasworks undertaking. It is, however, certainly true to say that both Courts assumed that it was so, and that this assumption has been over and over again accepted as a decision, and has been the foundation of a practice which has been accepted and acted upon ever since those decisions were given. I cannot read the judgment

(1) [1909] A. C. 78. (2) 10 Q. B. 208.
(3) 1 E. & E. 716.

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of Blackburn J. in the *Sheffield* case (1) in any other sense than as the acceptance of the view that those two cases did decide that principle, and that he agreed with it. If no other authorities than these three could be cited in support of the judgment, I should be of opinion that they were sufficient for the purpose. There is however one case, the report of which, though not satisfactory, must I think be treated as a direct authority of a Court of Appeal binding upon this Court. The case is *Peterborough Corporation* v. *Stamford Union*. (2) In that case the material facts were that the local authority were not charging the full rates for water which they were entitled to charge, and the receipts from the water undertaking were less than the amount of the working expenses. Under these circumstances the local authority claimed that the works in the parish in question were not liable to be rated. On the other hand the assessment committee claimed an assessment based upon a percentage upon the estimated capital expended upon the works in the parish. The question for the Court was whether the works in the parish were liable to be rated, and if so on what principle. The Court naturally answered the first part of the question in the affirmative, but the contention of the assessment committee as to the proper method of assessment was emphatically rejected, Watkin Williams J. describing it as a wholly artificial one, and upon the authorities altogether wrong. In the result the Court held that the rateable value of the works was nil. It must be noticed that in this decision not only was the capital value method of assessment rejected, but the profits basis was accepted and carried to its logical conclusion. The case was taken to the Court of Appeal, consisting apparently of Brett M.R. and Bowen L.J. It is reported mainly in reference to a question as to the right of appeal, but after disposing of that point the report in the Law Reports (3) proceeds: "The appeal was then heard upon the merits, but it was ultimately dismissed on the ground that the question at issue between the parties was

(1) 4 B. & S. 135, 144. (2) 31 W. R. 949.
(3) 12 Q. B. D. 3.

concluded by authority." In the Law Journal report (1) the authority is stated to be *Worcester Corporation* v. *Droitwich Assessment Committee.* (2) I cannot distinguish the *Peterborough* case (3) from the present one, and I do not think that this Court is entitled to differ from this decision, even if it desired to do so, unless it can find that the decision has been reversed or disapproved of in some authoritative manner. So far from this being the case, the same decision was come to in the year 1885 in the case of *Dewsbury and Heckmondwike Waterworks Board* v. *Penistone Union.* (4) In that case, as here, the contest was between the two methods of assessment, the assessment committee contending that the appellants' property, which consisted of indirectly contributing property, was to be estimated upon the principles laid down in the *Mile End Old Town* case (5) and the *West Middlesex Waterworks* case. (6) The judgment of the Court, consisting of Manisty and A. L. Smith JJ., was delivered by Manisty J., who in reference to this contention says (7): "As to the third point. We are clearly of opinion that what may happen to be the adequate remuneration to a contractor for erecting the appellants' works, is not the true measure of the net rateable value of their premises. This is not the test applied by the Parochial Assessment Act, nor is it a test which has ever to our knowledge been recognized in a court of law; and, what is more, it is obviously so unreliable and fallacious, as was pointed out during the argument of this case, that in our judgment no reliance whatever can be placed upon it." No appeal was made from this part of the judgment, though the local authority appealed from that part of the judgment which dealt with the right to take the water rate into account.

An attempt was made to distinguish the present case from the authorities to which I have referred, and from others which were cited, by contending that since the decision of

(1) 53 L. J. (M. C.) 33.
(2) 2 Ex. D. 49.
(3) 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 31 W. R. 949.
(4) 16 Q. B. D. 585; 17 Q. B. D. 384.
(5) 10 Q. B. 208.
(6) 1 E. & E. 716.
(7) 16 Q. B. D. 596.

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the *London School Board* case (1) and the *Dewsbury* case (2) a new factor has been introduced which must be taken into consideration, and that is the desire of a public authority to discharge a statutory duty, and for that purpose to seek assistance from the rates to enable them to discharge that duty properly. To some extent this is no doubt true, though I question whether the principle of the *School Board* case (1) will ever be applied, except in cases where no question of any receipt of a revenue arises. This certainly appears to be Lord Dunedin's view, as expressed in the passage in his speech in the *Orsett Union* case. (3) Assuming, however, that the Water Board for present purposes are to be regarded as the hypothetical tenant of the hereditaments in question, actuated by a laudable desire to carry out their statutory duties to the fullest extent, and having statutory authority to levy a deficiency rate, are they therefore to be regarded as having unlimited means at their disposal and therefore reasonably to be expected to offer as rent for all the hereditaments composing their entire undertaking, what would be a fair rate of interest on the value of all those hereditaments arrived at on the contractors' basis? I think not. In the *Dewsbury* case (4) Lord Esher points out the extent to which it is legitimate to take into account the power to dip into the rates. He says: "The legal principle is this: You are to take the annual value (subject to all the deductions which ought to be allowed) of the property to be the rent which a hypothetical tenant from year to year would give for it if he had it upon the same terms as the actual owner (i.e., in the present case this water authority or corporation) has it. In that view the headnote to *Mayor, &c., of Peterborough* v. *Stamford Union* (5) must be expanded, and read thus (adding the words in italics): 'Where land is occupied by a local authority for public purposes the land is to be assessed to the poor rate at the rent which a tenant would pay, if subject to the same restrictions as are imposed, *and entitled to the*

(1) 17 Q. B. D. 738.
(2) 17 Q. B. D. 384.
(3) [1920] A. C. 273, 299.
(4) 17 Q. B. D. 384, 387.
(5) 31 W. R. 949.

same advantages as are conferred, upon the local authority.' That is the true doctrine. Then the question is this, is it an advantage to a man to hold land upon these terms, viz., that, if there is a deficiency in the rents which he can obtain in any one year, he has a right to have that deficiency made up by a rate, but, if in any one year the rents which he obtains are more than his expenses, then he has the advantage of the profits? Of course it is a great advantage to a tenant that he can never lose in any one year, while in other years he may gain, and that advantage must be taken into account in estimating the rent which he would give for the land if he were placed in the same position as the actual owner. That is the true principle, and we are only asked to lay down the principle." Where the Legislature has fixed a maximum charge for water, and at the same time given power to levy a deficiency rate, it cannot have been within the contemplation of the Legislature that this power should for rating purposes be regarded as an inexhaustible purse, otherwise the charges which might be directly made for water would be of little protection. If this view is correct, it seems to follow that after all, even if a uniform system of valuation upon the contractors' basis could be forced upon all the rating authorities concerned, the sum to be apportioned among all those authorities would only be the same sum as would be available for that purpose had the profits basis been adopted in the first instance, and there would then remain this problem, how to apportion that sum among those authorities. At this point the decided cases would seem to present a real difficulty in the way of the appellants' case.

I have not attempted in this judgment to do more than give the reasons for the conclusion at which I have arrived. Nothing that I have said is, I think, contrary to what has been decided in any of the many cases which have been cited to us. To go through them all would result in a judgment of intolerable length. As Lord Loreburn said in the *Chertsey* case (1), the statutory test of what a hypothetical tenant might reasonably be expected to give as rent must

(1) [1916] 1 A. C. 337, 346.

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govern every case, however difficult its application may be. Thinking, as I do, that both on principle and on authority quarter sessions should have accepted the basis or method contended for by the Water Board as the one for ascertaining the rent which the hypothetical tenant might reasonably be expected to give for the hereditaments in question, it follows that in my opinion the decision of the Divisional Court was right, and these appeals must be dismissed with costs.

ATKIN L.J. These cases arise out of appeals brought by the Metropolitan Water Board against poor rates made in October, 1920, in respect of hereditaments in the respective parishes of Teddington, Hampton and Hampton Wick. The assessments in the respective parishes had stood for some years. The Water Board claimed substantial reductions: they failed before quarter sessions: but have succeeded before the Divisional Court. How substantial are the reductions obtained appears from the following comparison of the nett rateable values appealed against and the nett rateable values found by the Divisional Court. Teddington 2114*l.*, reduced to 832*l.*; Hampton 67,862*l.*, reduced to 34,220*l.*; Hampton Wick 1803*l.*, reduced to 868*l.*

The question is primarily one of fact—namely, what are the rents at which the hereditaments might reasonably be expected to let from year to year under the conditions set out in the Parochial Assessments Act, 1836? It is however a question of fact which, applied to many kinds of hereditaments, mines, docks, canals, sewers, gasworks, waterworks and railways and some public buildings, becomes very difficult to solve. In actual practice such hereditaments never are let from year to rear at a rent. The occupier, often a public authority, is usually the owner; often has no power to take on lease; and often is the only person who can by law occupy the hereditaments. The Legislature has given no assistance; and an elaborate system of rating has grown up which derives its authority from the simple statutory formula mentioned above, but has only become possible by the approval by

the Courts of various methods of deciding the issue of fact as falling within the formula. Rating law, so far as it is law, has been almost wholly made by the judges. Primarily rateable value is a question of fact; and it is only when the rating authority takes into account, or omits, some factor which by law it is not entitled to, or is bound to, take into account that a question of law emerges. In the present case two methods of solving the question of fact were presented to quarter sessions. Quarter sessions chose the one adopted by the Assessment Committee. If both were possible methods the decision of quarter sessions would be, I think, a decision on a pure question of fact. It is however contended by the Water Board that in law there is only one method of assessing waterworks, and that is the method propounded by them. If this is correct the decision of quarter sessions clearly involved a question of law. This appears to be the question we have to try.

The Assessment Committee (whom it will be convenient to call the respondents, as in the case stated) contend that the method propounded by them does in the circumstances effectively and legally solve the question of fact. They further contend that the method adopted by the Water Board not only fails in fact to give as correct a result as their method, but also in a substantial particular, the assessment of the indirectly productive hereditaments, departs from the method which the Water Board on the authority of decided cases set up as the sole legal test.

The Water Board's method adopts what is known as the profits basis. It assumes that the hypothetical tenant would only take the hereditaments for the purpose of making a profit, and would only pay a rent provided that the profits were sufficient to pay to him first a reasonable sum as remuneration for his capital employed in the business. The whole of the profits in excess of such sum may be assumed to be rent, but the rent will be confined to such excess, and if there is no excess then there is no rent. In estimating the profits for this purpose it is agreed that one must not take into account annual charges which would properly fall upon the hypothetical

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landlord. Interest and sinking fund charges therefore on the capital sunk either in constructing the hereditaments or in purchasing them must not be taken into account. The method is illustrated by the Water Board's figures for Teddington. The total rateable value of the whole undertaking situate in many parishes is first ascertained. This is got by deducting from the total gross receipts on revenue account the working expenses and the tenant's share above referred to, which in this calculation is taken at 7 per cent. of gross receipts, or 217,395*l.* From the total thus arrived at are deducted the statutory deductions for repairs; deducting again from the resulting total rates on that total at 13*s.* in the £ (which I assume to be an average taken on all the parishes) a sum is arrived at of 610,464*l.*, which is taken as the rateable value of the whole undertaking.

But for the purposes of the assessment of the hereditaments in each parish further calculations have to be made. In the first place an inquiry is made as to the proportion which the rateable value so found bears to the total capital value of the whole undertaking. It will be found that this inquiry is not directed in any of the cases which approve this method; and the use made of it appears to violate the rules laid down. At present it is sufficient to say that the capital value being found to be 24,912,118*l.*, the rateable value is found to be about 2½ per cent. of that sum.

We now come to the division of the total rateable value between the directly productive and the indirectly productive hereditaments, a distinction which is an accepted feature of this method of assessing rateable value. For the purposes of this case the rateable value of the whole of the directly productive hereditaments and of the whole of the indirectly productive hereditaments is ascertained. The rateable value of the latter is calculated upon the capital value thereof, and the percentage upon such value is taken to be 2½ per cent., being the proportion that total rateable value bears to the total capital value of the whole undertaking as mentioned above. The amount so obtained plus rates at 13*s.* in the £ is deducted from the total net rateable value

plus rates at 13*s.* in the £, and the difference is said to give the rateable value including rates at 13*s.* in the £ of the directly productive portion. The actual sum so arrived at is 195,844*l.*, and this figure is roughly 6½ per cent. of the total water rental—namely, 3,023,745*l.*

For the purposes of the parochial assessment the rateable values are arrived at on the basis of the above figures. The rateable value of the indirectly productive hereditaments is got by taking 2½ per cent. on the agreed capital value. The rateable value of the directly productive part is got by taking 6½ per cent. of the water revenue of the parish and deducting the parochial rates at 14*s.* 8*d.* in the £. It is thus apparent that the percentage of 2½ per cent. on capital value for indirectly productive hereditaments is not selected because it represents a reasonable rate of interest on a capital sum such as might be required by a contractor; it is merely the percentage which the rateable value of the whole (arrived at by deductions from the total revenue) bears to the structural value of the whole consisting of productive and unproductive portions alike. If the rateable value of the whole on this footing amounted to 7 per cent. or 10 per cent. or 15 per cent. of the whole structural value, then presumably the rateable value of the indirectly productive hereditaments in the parish would rise in the same proportion.

It is now necessary to examine the authorities which, it is said, prescribe that the method adopted by the Water Board is the only method permitted by law for ascertaining the rateable value of the Water Board's hereditaments. The first case is *Reg.* v. *Mile End Old Town Overseers.* (1) It was decided upon a case stated by a barrister on a reference to him by the Court on the hearing of a case stated by quarter sessions. The arbitrator found the facts. He finds the annual value of the indirectly productive hereditaments in these words (2): "In several of the parishes the water rates are very trifling: but the company possess therein extensive permanent works, such as buildings, reservoirs, conduits, canals, bridges and mains, yielding to the company no other

(1) 10 Q. B. 208. (2) 10 Q. B. 211, 212.

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profit than as being conducive to the earning of water rates received in other parishes. The annual value of these may be assumed, for the purpose of this case, to be 6500*l.* as mere land and buildings, with their fixtures and machinery attached, and derived some additional value from their capacity of being applied to such purposes as that of a water company." He then proceeds to find the tenant's share, deducts it from the total net receipts, and arrives at a total net rental of 30,800*l.* He then proceeds: "But, the works being in different parishes, in some of which (as above stated) no profits are derived from water rates, the basis of valuation will not be uniform throughout all of them. The parishes in which large profits are made by water rates will take those profits into their estimate, because the mere land covered by the mains and pipes is of trifling value. On the other hand, the parishes in which the water rates are small or none, and the land, buildings and machinery of the company extensive, will base their estimates on the probable rent of the land and buildings as such. Hence, before the net rental of 30,800*l.* is apportioned among the parishes in which the water is delivered and the water rates actually received, the annual value of works, legally rated on a different principle or basis, must be deducted: this last mentioned value is (as above stated) 6500*l.*; and therefore the net annual value to be apportioned among the parishes in the ratio of the net receipts for water rates in each is 24,300*l.* The result gives an annual value in Mile End Old Town which will support the rate." Having therefore deducted the annual value of the works (indirectly productive) legally rated on a different principle or basis, he proceeds to apportion the balance amongst the parishes in the ratio of either the net receipts in each parish or the quantity of mains, pipes and land in each parish. Either ratio gave about the same result and supported the rate appealed against. The water company contended that this method was wrong; that there should be no division into two classes of property directly and indirectly productive, and that the whole of the net receipts should be distributed according to the ratio of the hereditaments

in each parish. The argument for the rating authority clearly raises the question whether the rateable value of the indirectly productive hereditaments should be first ascertained: see the questions of Patteson J. on the argument of Sir F. Kelly. (1) The judgment of the Court upholds the award and the method of the arbitrator. As to the indirectly productive hereditaments the Court says (2): "The second portion has been first rated in the ordinary way by valuing the land with the buildings and fixtures thereon, and the amount of rate so ascertained has been deducted from the sum of rateable value, and distributed to the districts in which the parts of this portion are situate. An analogous course appears to have been adopted for railways in *Reg.* v. *London and South Western Ry. Co.* (3); *Reg.* v. *Grand Junction Ry. Co.* (4); and for gas companies in *Reg.* v. *Cambridge Gas Light Co.* (5) Also the spring which indirectly conduced to the ultimate profit by water rate was held rateable in the parish where it was situate, in *Rex* v. *New River Co.* (6), the quantum of such rate being left for the sessions."

Two matters emerge from the case. First, there was no contest between two methods, the profits basis and some other; secondly, the Court clearly accept the view that the indirectly productive hereditaments are to be assessed on a "different principle or basis" from the directly productive—namely, "in the ordinary way"—and the residue of the total rateable value is to be apportioned in accordance with net receipts or gross receipts.

The next case is *Reg.* v. *West Middlesex Waterworks Co.* (7) in the year 1859. This case arose on a case stated by the parties on an appeal against a rate, presumably under Baines' Act. The question only arose as to hereditaments indirectly productive, the only hereditaments in the parish of Hampton. The respondents, the overseers, contended that the company were to be rated in reference to the profit derived in the

(1) 10 Q. B. 216.
(2) 10 Q. B. 219.
(3) (1842) 1 Q. B. 558.
(4) (1844) 4 Q. B. 18.
(5) (1838) 8 Ad. & E. 73.
(6) (1813) 1 M. & S. 503.
(7) 1 E. & E. 716.

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parishes to which the water was conveyed: the company contended that they were to be rated on ordinary principles as laid down in the *Mile End* case (1), that is, not on the profits basis. This view is accepted by the Court. They say (2): "To the second question, requiring the principle to be stated on which the company is to be rated in respect of their plant, engine houses, cottages, buildings, wharfs, mains, land and premises, we answer, in the words of the *Mile End Old Town* case (3), that it is to be rated as for mere land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as that of a water company; and, we add, such additional value is derived from an increase of demand beyond supply, according to the principle regulating exchangeable value, and not by reference to receipts earned in another parish, beyond assuming that they are sufficient to pay for all outgoings, including profits on capital." The whole of the judgment is instructive. Wightman J. in delivering the judgment of the Court, after stating in a well known passage the necessity of protecting the occupier of an undertaking situate in several parishes from being rated beyond the rateable value of the whole, points out that profit earned in the particular parish cannot be the test, otherwise the indirectly productive hereditaments situate in one parish not contributing to the revenue would not be rateable, and proceeds (4): "But, as these parts of the apparatus, directly earning nothing, but indirectly conducing to such earnings elsewhere, are assumed to continue in operation, the company, to whose interest such continued operation is essential, must be assumed to pay adequate remuneration to a contractor for land and fixed capital vested therein, together with the labour and skill requisite for the effective continuance of such operation; and this contractor with the company would stand in the relation of occupying tenant to the parish, and the part within the parish would be the rateable subject, and the local rateable value would

(1) 10 Q. B. 208.
(2) 1 E. & E. 721.
(3) 10 Q. B. 208, 210.
(4) 1 E. & E. 723.

be such sum as would pay the rent of the land and the profit on fixed capital therein." This case seems to decide (1.) that to value the indirectly productive hereditaments you need not ascertain the rateable value of the whole, provided that you are assured that there will be receipts available to pay for all outgoings including profits and capital; and (2.) on that assumption the indirectly productive hereditaments should be valued on the contractors' basis, that is, adequate remuneration to a contractor for land and fixed capital vested therein.

It appears to me that these two cases, which have been the foundation of the profits basis method, are opposed to the particular method of taking a percentage on cost adopted by the Water Board in this case, and justify the decision of quarter sessions that the profits-earning basis contended for by the Water Board was not the true test of the rateable value of the hereditaments.

It cannot, however, be denied that after these two cases the profits basis method has been that generally adopted by rating authorities in rating waterworks; and that this method has received the approval of the Courts on several occasions in preference to any other. The result is that it is now claimed that what was originally an approved method of solving a question of fact has crystallized into a rigid legal formula, and that though essential changes have taken place in the constitution of water companies and their relations to the public, yet the method of arriving at the hypothetical rent approved in 1847 must be imposed upon local authorities by the Courts. If this were so, it would be an unfortunate instance of the effect of our habit of leaving large territories of law to be regulated by judicial application of general principles. The whole body of our system of law both in contract and tort has been so built up, and it can be claimed generally that in this way it has been adapted to the growing and changing needs of the community. It would be a misfortune if decisions on questions of fact should become stereotyped into law, so that when applied to changing facts inadequate solutions would result. In my opinion the law

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is not as rigid as the Water Board contend. It will be necessary, in the first place, to consider two cases upon which counsel for the Water Board placed much reliance. In *Worcester Corporation* v. *Droitwich Assessment Committee* (1), in the year 1876, the questions arose upon a case stated by the parties under Baines' Act. The dispute did not turn upon whether the profits basis or some other basis was to be adopted. Both parties appear to have adopted the profits basis, and the only dispute was whether the profits were to be computed upon the actual profits made by the corporation based upon their actual charges made under the powers of the Public Health Act, 1848, or (as the assessment committee contended) upon the profits which a hypothetical tenant might make having liberty to raise the price of water as he might think proper so far as not restricted by law; it being contended that there were no restrictions in law. The Divisional Court and the Court of Appeal both decided in favour of the corporation. Mellish L.J. said (2): "There are two questions to be considered: first, are the corporation, according to the true construction of the Public Health Act, prevented from charging for the use of the water a larger sum than the sum they actually require for the maintenance and repair of the waterworks? And secondly, if they are, can they be rated as occupiers in respect of profits which the law does not allow them to earn?" He then proceeds to answer the first question in the affirmative, and the second in the negative, expressing the opinion that the hypothetical tenant is to be a tenant subject to the restrictions, and citing in support *Liverpool Corporation* v. *Wavertree Overseers.* (3) This latter proposition is now well established, and the decision on the dispute submitted by the parties seems to be of little assistance in the present case. On the application of the principle, however, to the facts of that case it is difficult to see how even the assessment admitted by the corporation could stand, for it seems plain that in fact no profits at all were made. In 1883 there came

(1) 2 Ex. D. 49. (2) 2 Ex. D. 60.
(3) 2 Ex. D. 55, note (1).

before the Courts the case of *Peterborough Corporation* v. *Stamford Union* (1), where the corporation of Peterboroug showed a deficit on the working of the waterworks and claimed boldly that there was no rateable value, and succeeded both in the Divisional Court and in the Court of Appeal. The Lord Chief Justice in his judgment in the present case expressed some doubt as to the correctness of this decision, but it appears to be a logical result of the profits basis method. The difficulty it opposes to the respondents' (2) contention in the present case is that the assessment committee appear to have proceeded upon the contractors' basis, and had asked the Court whether that principle was correct, and received the answer No. The case is not fully set out in the report in the Weekly Reporter, and I have examined the original case from the Record Office. After setting out the figures showing the assessment of the gross rental at 864*l.*, the case proceeds: "The contentions of the respondents are: That because, as the respondents contend, the parts of the waterworks in the parish of Wilsthorpe produce no direct profits, but indirectly conduce to such profits in the city of Peterborough, such parts of the works are rateable in the ordinary way, that is, upon the rent of the land and adequate remuneration for the fixed capital invested therein. That the corporation of Peterborough are the trustees for the inhabitants of that city, who are the beneficial occupiers of the waterworks in the parish of Wilsthorpe. That as there is nothing in the Acts above mentioned to prohibit the corporation from providing for the payment of the local rates, it is their duty to include in the water rates a sum to provide for the payment of the local rates or taxes as a current and necessary expenditure incidental to the occupation of the waterworks." The contentions of the appellants are, first, the contention set out in the report that the works are not rateable; and, secondly, "that, if the works are liable to be rated, then that the works and mains being spread over several parishes and in different unions, and the actual supply pipes wholly situated in another parish,

(1) [31½ W. R. 949. (2) Appellants in this appeal.

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the net rateable value should have been apportioned amongst the parishes by dividing the works into those which indirectly and those which directly contribute to the earnings in the proportions (alleged by the appellants to be usually adopted) of one-third to the former and two-thirds to the latter. The questions for the opinion of the Court are: (1.) Whether the said works in the parish of Wilsthorpe are liable to be rated; (2.) Whether the principle upon which they have been rated by the respondents is correct; (3.) Whether the principle upon which the appellants contend they should have been rated is correct." To these questions are appended in the margin the written answers of the Divisional Court—namely, against (1.) Yes; (2.) No; (3.) Yes. The case proceeds that if the Court should answer the first question in the affirmative and the second in the negative it was agreed that the rate should be amended as quarter sessions or an agreed arbitrator should determine, quarter sessions or the arbitrator in determining the amount to be guided by the answer which the Court should give to the third question. On examining these contentions it becomes plain that so far from the assessment committee having adopted the method of the present respondents (1) they had supported their assessment on the ground that the hereditaments did indirectly conduce to profits in the city of Peterborough, and on the quite untenable ground that the inhabitants were the beneficial occupiers of the hereditaments, for whom the corporation were only trustees. It becomes obvious therefore why the Courts, coming to the conclusion that no profits at all were made in Peterborough either directly or indirectly, decided against the assessment committee. The decision therefore loses much of its value for present purposes.

A notable case on the development of the law is *Dewsbury Waterworks Board* v. *Penistone Union* (2) in 1885. There the appellants were a local authority having power to make a public rate called the public water rate to the extent necessary to discharge the expenses of maintaining the waterworks not defrayed out of the water rents.

(1) Appellants in this appeal. (2) 16 Q. B. D. 585.

The appellants sought to confine the rateable value to a calculation from the water rents only. The appellants paid in the year of charge 9902*l.* interest on borrowed money, and the water rates in question were 6127*l.*, which appear from the case to have been levied towards meeting the interest charge. The Divisional Court held that the water rates must be taken into account. At the same time they held that adequate remuneration to a contractor for erecting the appellants' works was not the true measure of rateable value, Manisty J. saying that it was not a test which had ever to their knowledge been recognized in a Court of law. This is a hard saying, as it appears to be the test adopted in the *Mile End* case (1) and the *West Middlesex* case (2) for the indirectly productive hereditaments, and has been adopted in numerous railway, sewer and school board cases. But the decision as to the water rates seems to indicate a mode of transition from the rigid application of the profits principle. The interest on capital is in respect of landlords' charges, and the power to make a rate to raise such charges is to be taken into account in fixing the hypothetical rent. This decision was confirmed in the Court of Appeal (3) in 1886. Lord Esher says (4): "The legal principle is this: You are to take the annual value (subject to all the deductions which ought to be allowed) of the property to be the rent which a hypothetical tenant from year to year would give for it if he had it upon the same terms as the actual owner (i.e., in the present case this water authority or corporation) has it. In that view the headnote to *Mayor of Peterborough* v. *Stamford Union* (5) must be expanded, and read thus (adding the words in italics): 'Where land is occupied by a local authority for public purposes the land is to be assessed to the poor rate at the rent which a tenant would pay, if subject to the same restrictions as are imposed, *and entitled to the same advantages as are conferred*, upon the local authority.' That is the true doctrine. Then the question is this, is it an advantage to a

(1) 10 Q. B. 208.
(2) 1 E. & E. 716.
(3) 17 Q. B. D. 384.
(4) Ibid. 387.
(5) 31 W. R. 949.

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man to hold land upon these terms, viz., that, if there is a deficiency in the rents which he can obtain in any one year, he has a right to have that deficiency made up by a rate, but, if in any one year the rents which he obtains are more than his expenses, then he has the advantage of the profits ? Of course it is a great advantage to a tenant that he can never lose in any one year, while in other years he may gain, and that advantage must be taken into account in estimating the rent which he would give for the land if he were placed in the same position as the actual owner."

We now come to the legal principle laid down in *Reg.* v. *London School Board* (1) that in ascertaining the hypothetical rent you may treat the occupier himself as being one, or if necessary the only, hypothetical tenant. This doctrine, simple as it sounds, appears to have been in the nature of a discovery. I think that all cases decided before its date have to be carefully examined in the light of this decision. The question arose in respect of the rating of schools built and occupied by the school board for London. Some small revenue was derived by it from fees. It was found by the justices in a special case that under the restrictions imposed by the Education Department no profit could be made by the school board and that no tenant could be found willing to take the schools, but that the school board itself should be included as a possible hypothetical tenant, and that an assessment of 4 per cent. on the original cost of the land and 5 per cent. on the then estimated cost of the buildings was a fair measure of rateable value. The Court of Appeal (Lord Esher M.R. and Bowen and Fry L.JJ.) upheld this view. Lord Esher said this (2) : " It is said that the school board ought to be excluded because it can never obtain any beneficial interest from its tenancy ; but it can be a tenant ; it has a duty to perform which may induce or force it to be a tenant." Bowen L.J. said (3) : " It does not matter whether the school board wants the premises for the purpose of profit, or will make profit out of them ; the question is whether the school

(1) 17 Q. B. D. 738. (2) 17 Q. B. D. 740.
(3) Ibid. 741.

board wants and would take them; I am satisfied that the principle on which the value has been estimated is sound." Fry L.J. said (1): "The term 'sterility' has been introduced into the cases, because as a general rule a profit is produced, but it does not by any means follow that because there is no profit there is no value. There could be no better illustration of this than the present case. The only question is whether the person to be considered as a tenant could reasonably be expected to take the premises from any motive." In the *Erith* case (2) the decision in the *School Board* case (3) and the grounds for it, and the passages in the judgment of the Lords Justices which I have read, were approved expressly by Lord Herschell L.C., whose speech met with the concurrence of all the other members of the House.

Applying these principles, we find that it does not follow that because there is no profit there is no value. It must be also true that it does not follow that because there is small profit there is small value; though both propositions may be true where profit making capacity is the only element of value. But the question is: "Whether the person to be considered as a tenant could reasonably be expected to take the premises from any motive." The answer in the present case is that there was evidence upon which quarter sessions could find not only that the Water Board might be expected to take the premises from some other motive than to make profits, but that the profits motive would in the circumstances not influence them in fact. There are many similar undertakings carried on by commercial companies for the purpose of making a profit. In such cases it would be difficult to resist the inference that if no profit would reasonably be expected the premises would not be occupied at all; and that, if the expected profits were not in excess of the tenant's outgoings and the tenant's share of profits, no rent would be paid, and if they were, rent would only be paid to the extent of the excess. The position seems to be entirely altered when the occupation is by a public authority performing the necessary

(1) 17 Q. B. D. 742. (2) [1893] A. C. 562.
(3) 17 Q. B. D. 738.

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service of providing inhabitants of a district with water under restrictions which prevent the receipt of profits as such, though receipts are permitted which allow the authority to defray interest and other charges on landlord's capital. The motive of earning profits is, as I suggest, absent. It is true that in some cases such an authority may have no means of meeting outgoings other than by imposing certain maximum charges on its customers. In such a case the hypothetical tenant (whether the occupier or another does not matter, for the restrictions apply in either case) cannot reasonably be expected to give a rent which would with the other outgoings exceed his total possible gross receipts. In such a case what is called the profits basis, but is really a revenue basis, may and possibly must apply; as of course it does in any case where both parties start with the assumption that profits or receipts alone give the test of value. But in many cases the public authority does not depend exclusively upon its charges to the consumers of its commodities or services. It has also a power limited or unlimited of raising revenue by such means as levying a public rate. Where this is the case the value of the occupation to such an occupier is not limited by the amount of its receipts from its undertaking. The only question is what might it reasonably be expected to give in order to perform the duty which it desires to perform. In these circumstances that sum will not necessarily be limited by small profits; but may well be measured as a practical solution of the question of fact by taking into consideration interest on structural value. This is the principle of the school board and sewage works cases, and I can see no reason why such a simple principle should not be also applied to the waterworks of public authorities. It appears to be true that it has not hitherto been the practice so to apply it; and the change of view may cause inconvenience to some water companies, some professional gentlemen experienced in rating matters, and even some judges. But I venture to doubt the wisdom of confining legal rules within rigid categories, and consider that it will be to the public advantage to secure that the true value in the terms of

the statute be made available for either local or general taxation.

It was suggested in argument for the Water Board that the decision of the House of Lords in the case of *Port of London Authority* v. *Orsett Union* (1) determined that undertakings such as the present, which were profit bearing, or had an earning capacity, could only be rated on the profits basis; and a passage from the judgment of Lord Birkenhead L.C. (2) was said to lay this down. I feel satisfied that the Lord Chancellor had no intention of deciding this question, but was directing his remarks to the question in issue, which was whether in assessing the Port of London Authority on the profits basis, a deduction should be made of the tenant's share. Lord Dunedin's judgment (3) appears to make it clear that their Lordships had it in mind that more than one method of valuation was possible; and that the profits basis method was an ordinary and proper mode of procedure. It may be remarked that in the case of the Port of London Authority, so far as I am aware, there was no power of levying such a rate as the deficiency rate in the present case, and that the value of the occupation therefore, in accordance with what I have said above, had to be determined in fact by reference to the receipts or profits capable of being earned.

I may refer to the *Orsett Union* case (1) to answer one argument relied on by the Water Board, and illustrated by a passage from Lord Dunedin's judgment (4), where he deals with the curious result that would arise if the rateable value suddenly varied, merely because a hereditament was transferred from private ownership to the ownership of a public authority. If the conditions otherwise remained the same and the same method of assessment were being applied, which I think are the assumptions in the passage cited, this criticism is obviously just. On the other hand, if on transfer to public ownership the powers of charging became restricted, I apprehend that the profits basis might necessarily show a reduced valuation. Similarly, if the hereditament came into

(1) [1920] A. C. 273.
(2) Ibid. 284.
(3) [1920] A. C. 295
(4) Ibid. 295.

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the ownership of an authority, who as such had power to obtain annual receipts from levying a rate, I see no reason why the rateable value should not increase. And on the same principle, if the new owner occupied the property, or would take the property into his occupation, whether profits were made or not, I see no reason why the existence of a new hypothetical tenant occupying for different motives should not be taken into account so as to change the correct method of estimating value to him and thereby, it may be, to increase rateable value.

It only remains to say that I think that any method applied to any such undertaking as the present should be capable of being applied uniformly in each parish, so as to secure that the rateable value of the whole is not exceeded. For this purpose it matters not whether you first obtain the rateable value of the whole, or, as in the valuation of railways, the rateable value of the parts. In the present case there is no difficulty in calculating the rateable value of the whole undertaking on what is called the contractor's basis. This is shown by the Water Board's own figures who, it will be remembered, arrive at the critical figure of $2\frac{1}{2}$ per cent. by taking the ratio of the net rateable value to the structural value of the whole undertaking, 610,464*l.* to 24,912,118*l.* It is true that this method may increase the rateable value of indirectly productive hereditaments, as compared with directly productive hereditaments; of reservoirs against pipes. But from the time of the *West Middlesex* case (1) the division has been subject to comment: see the remarks of Wightman J. in the later case. It seems difficult to see why, if you are merely ascertaining the rent of the hereditament, waterpipes without a reservoir should be proportionately of greater value than a water reservoir without pipes; or why the position should alter when both are filled with water, and the undertaking is working as a whole; why the shop counter should be rated at a higher rate than the shop storeroom; or the bar higher than the cellar.

In the result therefore I come to the conclusion that the two so-called principles of valuation, profits basis and contractor's

(1) 1 E. & E. 716.

basis, are but "formulæ for arriving at the solution of questions of fact" in the words of Lord Watson in the *N. & S. Western Junction Ry. Co.* v. *Brentford Union.* (1) Quarter sessions had the power to select either without infringing any rule of law, if they thought that either satisfactorily solved the question of fact. They have decided in favour of the contractor's principle, and as that seems to me not only unobjectionable in point of law, but also, which is irrelevant, preferable in the circumstances of this case in fact, I think that the question asked in the case should be answered in the affirmative and that the appeal should be allowed with costs here and below.

I ought to add that in coming to this conclusion I have derived much assistance, not only from the admirable arguments of counsel on both sides, but from the discussion of the rateability of municipal waterworks in Mr. Ryde's work on Rating Law, 4th ed., pp. 384–403. The criticisms of legal principles made in those pages are so weighty and pointed that they could not be ignored in the argument or in any decision founded on the argument.

LAWRENCE J. The question on this appeal is whether, in arriving at the rateable value of the parochial portions of a water undertaking extending into several parishes and occupied by a public body restricted by statute in making profits, the rating authority is obliged in law to apply a method which in this case has conveniently been called "the profits basis," or whether in arriving at such rateable value the rating authority is obliged in law, or alternatively is at liberty, to apply a method which in this case has conveniently been called "the contractor's basis." Mr. Mitchell-Innes contended that the Court of quarter sessions had concluded that it was at liberty to apply either the profits basis or the contractor's basis, whichever method in its opinion was better calculated to arrive at the rateable value of the parochial portions in question, and had found as a fact (after taking into consideration the result of applying each of these methods)

(1) 13 App. Cas. 592, 594.

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that the value arrived at by applying the contractor's basis was the true rateable value of such parochial portions; he thereupon submitted that the special cases raised no question of law, and that the Divisional Court had no power to review the findings of the Court of quarter sessions, and presumably therefore that the latter ought not to have stated the special cases at all.

In my opinion this contention and submission are not well founded. In the first place I am of opinion that, according to the true construction of the special cases (particularly when read in the light of the judgment of the chairman of the Court of quarter sessions), the decision at quarter sessions was that the contractor's basis was on principle the only proper method to apply to a case where the hereditaments formed part of an undertaking occupied by a public body restricted by statute in making profits, and that to such a case the profits basis was inapplicable. This view seems to me to be the only view consistent with the well recognized necessity for the adoption of a uniform method by all the various rating authorities concerned in rating the parochial portions of an undertaking which extends into several parishes.

It is well settled that a mixed application of the contractor's basis and of the profits basis to the several parochial portions of the same undertaking is not permissible—see per Lord Loreburn in the *Banbury* case (1)—because such an application would be contrary to the fundamental principle laid down in the *West Middlesex* case (2), that it is the duty of the Court to protect an occupier from being rated beyond the rateable value of the whole undertaking—a principle which has never since been questioned, and was expressly recognized by Mr. Mitchell-Innes in his opening. I think it is fair to assume that the Court of quarter sessions was well aware of this principle and would not have decided in favour of the contractor's basis, unless it had felt itself obliged in law to do so, as (in view of the fact that all the parochial

(1) [1909] A. C. 78, 87. (2) 1 E. & E. 716, 722.

portions of the Water Board's undertaking outside the Kingston Union are rated on the profits basis) such a decision, if merely optional, would have been a deliberate violation of this principle, which ought not to be imputed to the Court unless no other interpretation of its judgment is open. I am confirmed in my opinion as to the real question intended to be raised by the special cases by the fact that the authorities cited by counsel for the Assessment Committee to the Court of quarter sessions (as well as to the Divisional Court and to this Court) were authorities which, in so far as they were applicable to this case, went to show, not that it was permissible to apply either method according to whichever produced the better result in the parish immediately concerned, but that it was wrong in principle to apply the profits basis to an undertaking occupied by a public body restricted by statute in making profits, and that the only proper method to apply to such a case was the contractor's basis. In fact, the arguments addressed to us by counsel for the assessment committee bear a strong resemblance to the argument to be found in Mr. Ryde's valuable book on Rating: see 4th ed., pp. 384–403, where that learned author states at length his reasons for concluding that the contractor's basis should be substituted for the profits basis in rating gasworks and waterworks when held for public purposes; the learned author, however, not suggesting that in such cases both methods are or ought to be open.

Further, I am of opinion that the special cases raise a question of law, described by Lord Loreburn in the *Banbury* case (1) as "a matter of law relating to the relevancy of evidence," whether the Court of quarter sessions took the view that both methods were open and preferred the contractor's basis, or whether that Court took the view that it was obligatory in law to adopt the contractor's basis. In either case the question arises whether the Court of quarter sessions was or was not obliged in law to adopt the profits basis, which is the real question we have to decide.

In my opinion this case furnishes yet another example of

(1) [1909] A. C. 78, 84.

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the great difficulty which, owing to the absence of any statutory guidance, exists in arriving at the true principles upon which the rateable value of the parochial portions of an undertaking occupied by a public body restricted by statute in making profits ought to be ascertained. In such cases experience seems to have taught that the only practicable method of arriving at the rateable value is to apply either the profits basis or the contractor's basis, at all events no other method has been suggested.

There is no need to define the terms "profits basis" and "contractor's basis," which have been used in this case to describe two well known rating formulæ as to the meaning and effect of which the parties seem to me to be in entire accord. For the purpose of this case it is enough to state that the essential distinction between the two methods is that the application of the profits basis involves, as a first step, the ascertainment of the rateable value of the whole undertaking by reference to its receipts and expenditure followed by the apportionment of such value among the several parishes, whereas the application of the contractor's basis involves no such ascertainment or apportionment. Nor is there in my opinion any need to go into the figures showing how in the present case the result of adopting the one or the other of these formulæ has been arrived at, as the parties are agreed upon that result.

It is common ground between the parties that, ever since the year 1847, the profits basis and no other has been applied in ascertaining the rateable value of the parochial portions of all waterworks in this country, whether occupied by trading companies or by public bodies. Ever since the Water Board was created in 1902 this method of rating has been applied to every portion of its waterworks, as well in the parishes immediately concerned as in all the other numerous parishes into which its system extends. In or about the year 1906 the London quarter sessions decided that the profits basis was the right basis to apply in ascertaining the rateable value of the parochial portions of the Water Board's works in the 101 parishes in the metropolitan

area, and those portions have ever since that decision been and are now rated on this basis.

Mr. Tyldesley Jones on behalf of the Water Board contended that it had long since been firmly established by authorities binding on this Court that the profits basis was the only basis which could legally be applied by the rating authorities when ascertaining the rateable value of the parochial portions of waterworks, whether occupied by public bodies or by trading companies. In support of this contention he relied mainly on the following cases—namely, the *Mile End* case (1); the *West Middlesex* case (2); the *Sheffield* case (3); the *Droitwich* case (4); and the *Stamford* case. (5) The first two of these cases are admittedly the leading authorities on the proper method of apportioning the rateable value of the whole of a water undertaking among the several parishes into which it extends after such value has first been ascertained by reference to its receipts and expenditure. The question has been raised, however, whether these cases decide that the profits basis is the only proper method to apply, or whether they merely deal with the proper apportionment of the value when that method is applied. In the *Mile End* case (1), which was decided in the year 1847, it is clear that the rateable value of the whole undertaking had been ascertained by reference to its receipts and expenditure, and that the only question before the Court was how that value ought to be apportioned among the several parishes. The actual decision was that, for the purposes of apportionment, the undertaking ought first to be divided into directly and indirectly productive hereditaments, then that the rateable value of the indirectly productive hereditaments, ascertained on the contractor's basis, ought to be deducted from the rateable value of the whole undertaking, and finally that the resulting balance ought to be divided among the parishes into which the directly productive hereditaments extended in proportion to the receipts earned

(1) 10 Q. B. 208.
(2) 1 E. & E. 716.
(3) 4 B. & S. 135.
(4) 2 Ex. D. 49.
(5) 31 W. R. 949; 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 32 W. R. 548.

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in those parishes. In my opinion this case only helps the Water Board, if at all, in that the Court there expressed no disapproval of the adoption of the profits basis.

The *West Middlesex* case (1), which was decided in the year 1859, has given rise to much discussion before us. The material question there before the Court was the principle upon which the company was to be rated in respect of a water main under a highway in the parish of Hampton. This main was the only part of the company's undertaking in that parish and was only indirectly productive of profit to the company. According to the special case the company contended that, if it was liable to be rated at all, it ought to be rated on the contractor's basis, whilst the parish contended that the company should be rated by reference to the profit derived in the parishes to which the water was conveyed. This latter contention is explained in the judgment to mean that the parish claimed that the company should be rated on the quantity of the apparatus in the parish. The arguments are not reported, it is therefore impossible to say whether any and what admissions were made by counsel at the hearing; but having regard to the contentions set out in the special case, I conclude that it must have been common ground between the parties that the undertaking was earning sufficient profits to make it worth while for the parish to advance its claim and for the company to resist that claim, and consequently that there were more than sufficient profits to provide for the full amount of the rateable value of the indirectly productive hereditaments when ascertained on the contractor's basis, thus rendering it unnecessary to go into the question of the amount of the rateable value of the whole undertaking or into the question whether the profits basis or the contractor's basis was the proper method to apply. The judgment delivered by Wightman J. shows clearly that the Court appreciated that it was dealing with a case which involved the application of the profits basis and deemed it advisable to state the reason why that method was the true method to apply in cases where the undertaking extended

(1) 1 E. & E. 716.

into several parishes. Accordingly the judgment states that the Court is bound to protect the occupier from being rated beyond the rateable value of the whole undertaking and that therefore the separate rates in the various parishes must be treated as so many claims upon one given fund, which fund must be apportioned among such claims, with the result that every addition to the rateable value assigned to one parish must diminish the rateable value which might be given to some other parish. The statement of this result makes it quite clear that the given fund referred to is the amount of the rateable value of the whole undertaking arrived at by reference to receipts and expenditure and can have no application to an amount arrived at by aggregating the separate rateable values of the various parochial portions ascertained on the contractor's basis or to an amount arrived at by applying a mixed method of rating. The actual decision was that the method of apportionment laid down in the *Mile End* case (1) was the right method to apply. In the *Sheffield* case (2), which was decided in the year 1863, the profits basis and the contractor's basis came into direct competition. The question before the Court was as to the correct method of ascertaining the rateable value of the parochial portions of a gas undertaking (which stands on the same footing as a water undertaking), and after taking two years to consider this question the Court decided that the profits basis was the correct method to apply. When reading the judgment in that case Mr. Mitchell-Innes laid stress on the use of the indefinite article in the expression "a proper mode" (3), but the Court was there only dealing with the question whether the profits basis had been properly applied. It is plain from the judgment as a whole that the Court came to the conclusion that the earlier cases had established as a matter of law that the profits basis was the only right basis to apply and that the law ought not to be unsettled where the Court could not lay down a rule which was not open to exception; consequently the Court held (4) that the

(1) 10 Q. B. 208.
(2) 4 B. & S. 135.
(3) 4 B. & S. 147.
(4) 4 B. & S. 149.

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method which *must* be adopted was to apply the principles explained in the judgment in the *West Middlesex* case. (1) The *Sheffield* case (2), therefore, not only approved of the principles laid down in the judgment in the *West Middlesex* case (1), but is a direct authority for the proposition that the profits basis is the only correct method to apply in ascertaining the rateable value of the parochial portions of a gas or water undertaking.

There is one point taken on behalf of the Assessment Committee which can be conveniently disposed of here. It was contended that, because in applying the profits basis in the present cases only $2\frac{1}{2}$ per cent. had been allowed on the value of the indirectly productive hereditaments, therefore that basis was not applicable, as such percentage did not represent an adequate remuneration to a contractor for land and fixed capital invested therein as required by the *West Middlesex* case. (1) In my opinion this contention is not well founded. Although the judgment in the *West Middlesex* case (1) does not state what percentage would represent an adequate remuneration to a contractor, it is now settled that in the absence of special circumstances the established practice in applying the contractor's basis is to allow 4 per cent. on the value of land and 5 per cent. on the value of buildings, but that this is not an inflexible rule is shown by the speech of Lord Parker of Waddington in the *Chertsey* case. (3) In the present case the parties have agreed the result of applying the profits basis, therefore the Court is bound to assume that such result has been correctly arrived at and cannot go into the question whether the Water Board could or could not have discharged the onus of proving that the ordinary percentages ought not to have been taken. In these circumstances the fact that only $2\frac{1}{2}$ per cent. has been allowed does not in my opinion show either that it is impossible to apply the profits basis or that such basis has been incorrectly applied.

In my opinion the conjoint effect of the *Mile End* case (4),

(1) 1 E. & E. 716.
(2) 4 B. & S. 135.
(3) [1916] 1 A. C. 337, 360, 361.
(4) 10 Q. B. 208.

the *West Middlesex* case (1), and the *Sheffield* case (2) was definitely to establish that in rating waterworks and gas-works the profits basis was not merely a proper method which might be applied, but was the only right method which ought to be applied by all the rating authorities concerned in order that the true rateable value of the directly and indirectly productive parochial portions of such undertakings might be ascertained and at the same time protection might be afforded to the occupiers against being rated beyond the rateable value of the whole of their undertakings. This view of the effect of these cases has been accepted ever since they were decided, and is the view taken by the Divisional Court in the present case.

On behalf of the Assessment Committee, however, it is contended, first, that these cases only dealt with water and gas undertakings when occupied by trading companies and are not applicable to such undertakings when occupied by public bodies; and secondly, if that be not so, that the more modern authorities show that the principles laid down in these cases ought no longer to be applied to such last mentioned undertakings.

The answer of the Water Board to the first of these contentions is that not only are the principles laid down in these cases applicable as well to water undertakings occupied by public bodies as to water undertakings occupied by trading companies (such companies being universally restricted by statute in making profits), and that not only have these principles in fact been so applied in the past, but also that it has been expressly decided by cases binding on this Court that they are so applicable. The two principal cases relied upon for this purpose are the *Droitwich* case (3) and the *Stamford* case. (4) In the *Droitwich* case (3), which was decided in the year 1876, the actual decision was that in ascertaining the rateable value of a water undertaking occupied by a public body prevented by statute from charging

(1) 1 E. & E. 716.
(2) 4 B. & S. 135.
(3) 2 Ex. D. 49.
(4) 31 W. R. 949; 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 32 W. R. 548.

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more than sufficient to enable it to maintain the waterworks, the public body could only be rated in respect of profits actually earned. There was no contest in that case between the profits basis and the contractor's basis. Both parties seem to have accepted the fact that the profits basis was the proper method to be adopted, but to have differed as to the correct manner in which that method ought to be applied. That case therefore, in my opinion, is only useful in the present case as leading up to the *Stamford* case (1), and possibly as emphasizing the fact that the profits basis was at that date the accepted method of rating waterworks occupied by public bodies. In the *Stamford* case (1), which was finally decided by the Court of Appeal in the year 1883, the question whether the profits basis or the contractor's basis was the right method to adopt when ascertaining the rateable value of a water undertaking occupied by a public body restricted in making profits was directly raised and determined. The reports of this case are very meagre, but I have had an opportunity of seeing the original special case, from which it appears that the rating authority had rated the parochial portions of the waterworks in the parish concerned (which portions consisted entirely of indirectly productive hereditaments) on the contractor's basis without first ascertaining the rateable value of the whole undertaking either by reference to its receipts and expenditure or otherwise, and that the contention of the corporation of Peterborough (so far as material for the purposes of the present case) was in substance that the proper method which should have been adopted was the profits basis in accordance with the principles laid down in the *West Middlesex* case. (2) The Queen's Bench Division decided that the principle upon which the parochial portions had been rated by the rating authority was incorrect, and that the principle upon which the corporation contended they should have been rated was correct. In my opinion this case is unsatisfactory in several respects. It appears from the special case that the rating authority endeavoured to support

(1) 31 W. R. 949; 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 32 W. R. 548.
(2) 1 E. & E. 716.

its assessment on the unconvincing grounds that the parochial portions in question conduced indirectly to the profits in the city of Peterborough (which profits were in fact non-existent) and that the corporation of Peterborough were trustees for the inhabitants of that city, who were the beneficial owners of the parochial portions in question. How far these grounds were relied upon in argument by counsel does not appear, but the Court decided that the contractor's basis was wrong, and that the profits basis must be applied, and that the proper application of the latter basis was covered by the decision in the *Droitwich* case. (1) The contentions of the parties, and the reasons given by the learned judges in the Queen's Bench Division, may be open to criticism, but the fact remains that the Court of Appeal affirmed the decision. Although both the *Droitwich* case (1) and the *Stamford* case (2) have been brought to the attention of the Courts on several occasions since they were decided they have never been overruled or even questioned by the Court of Appeal or by the House of Lords; it follows, therefore, that they ought to be followed in this Court. Apart altogether from these two cases, however, I am of opinion that the decisions in the *Mile End* case (3), the *West Middlesex* case (4) and the *Sheffield* case (5) apply to water undertakings occupied by public bodies as well as to water undertakings occupied by trading companies, and that the Divisional Court was right in holding that the present case was covered by those decisions.

There only remains to be considered the contention of the Assessment Committee that in the light of the more modern decisions the principles laid down in the three cases to which I have just referred ought no longer to be applied to water undertakings occupied by public bodies restricted by statute in making profits, and that the only proper method to apply in rating such undertakings in the future is the contractor's basis. The two cases chiefly relied upon in support of this proposition are the *London School Board* case (6), decided in

(1) 2 Ex. D. 49.
(2) 31 W. R. 949; 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 32 W. R. 548.
(3) 10 Q. B. 208.
(4) 1 E. & E. 716,
(5) 4 B. & S. 135.
(6) 17 Q. B. D. 738.

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1886, and the *Erith* case (1), decided in 1893. In my opinion both these cases are distinguishable from the present case. The hereditaments in each of these cases in my opinion differed essentially in character from the hereditaments in the present case in that the former were not part of a revenue earning concern in the ordinary acceptation of that term, such as the Water Board's undertaking. In the *Erith* case (1) both the *Droitwich* case (2) and the *Stamford* case (3) were cited, and Lord Herschell L.C. in his speech (4) points out the distinction between the class of cases dealing with undertakings of the kind in question here and the class of cases with which the Court was there concerned. It would, in my opinion, be placing too narrow a construction on the language used by the Lord Chancellor in drawing this distinction to hold that because the expression "and other industrial undertakings" was coupled with the words "gas-works and waterworks" therefore there was no intention to include waterworks occupied by a public body, even if such last mentioned waterworks could not properly be termed "industrial" undertakings, which I think is open to doubt. Adapting Lord Herschell's language to the present case, I am of opinion that the class of cases of which the *London School Board* case (5) and the *Erith* case (1) are examples, affords no guide to the assessment of such hereditaments as those with regard to which this Court is now asked to decide what is the proper principle of rating. I am confirmed in my opinion upon this point by the speeches delivered in the House of Lords in the *Orsett* case (6) and by the fact that although thirty years have elapsed since the *Erith* case (1) was decided all the rating authorities throughout the country have continued to rate water undertakings occupied by public bodies on the profits basis in accordance with the decision in the *West Middlesex* case. (7)

If the matter were res integra and the Court were being

(1) [1893] A. C. 562.
(2) 2 Ex. D. 49.
(3) 31 W. R. 949; 12 Q. B. D. 1; 53 L. J. (M. C.) 33; 32 W. R. 548.
(4) [1893] A. C. 592.
(5) 17 Q. B. D. 738.
(6) [1920] A. C. 273.
(7) 1 E. & E. 716.

asked under some recent Act of Parliament for the first time to lay down the proper principles of rating in a case like the present, I think many of the reasons advanced in support of this appeal would require careful consideration; but in such circumstances I should have desired more information as to the views taken by those parishes in which the parochial portions consisted entirely or mostly of directly productive hereditaments. As matters stand, however, I am of opinion that, so far at all events as this Court is concerned, it is settled law that the profits basis is the method of rating which must be applied by all the rating authorities in the several parishes into which the Water Board's undertaking extends, and consequently that this appeal fails and should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Gibson & Weldon, for W. Taylor, Kingston.*

Solicitor for respondents: *C. A. Hunt.*

W. H. G.

[IN THE COURT OF APPEAL.]

GLICKSMAN *v.* LANCASHIRE AND GENERAL ASSURANCE COMPANY, LIMITED.

Insurance (Burglary)—Proposal Form—Proposal by Partners—Questions in Proposal Form—Basis of Contract—Misstatement—Non-disclosure and Concealment—Former Proposal by one Partner refused—Material Fact.

Two persons, desiring to insure stock in trade from loss by burglary in a dwelling-house and shop where they carried on business in partnership, signed and tendered to an insurance company a proposal form after filling with their names a space left in the form for "Name of proposer." The form contained several questions which with the answers of the partners were:—(*a*) Are you the sole occupier of the premises? Yes; (*b*) State how long you have occupied the premises. (Answer) Occupied seven years; (*c*) Are the premises occupied by proposer at night? Yes; (*d*) Has any company declined to accept, or refused to renew, your burglary insurance? If so, state name of company. (Answer) Yorkshire accepted, but proposers refused. The partners also signed a declaration at the foot of the form pledging themselves

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that the above answers were true and that they had withheld no information that might tend to increase the company's risk, and agreeing that the declaration and answers should be the basis of the contract between them and the company, and further agreeing to accept a policy subject to the usual conditions prescribed by the company. The proposal was accepted and a policy was issued, wherein the partners were called the assured, containing a proviso that the statements made by the assured in the proposal and declaration were true in all respects, and that if the policy were obtained through any misrepresentation, suppression, concealment, or untrue averment whatsoever by the assured, then the policy should be void. The policy also contained a condition referring disputes to arbitration.

If the word "you" in questions (*b*) and (*c*) meant "you or either of you," the answers were true. With regard to question (*d*) the fact was that an insurance office other than the company mentioned in the answer had refused a proposal for a burglary insurance made by one of the two persons on a former occasion when he was carrying on the same business upon the same premises, but without a partner.

During the currency of the policy a burglary was committed on the premises. The person above mentioned, who was again carrying on the business alone, and in whom the benefit of the policy was then vested, made a claim. The insurance company resisted the claim on the grounds: (i.) That a false answer had been given to question (*d*) and (ii.) that the policy had been obtained by suppression or concealment of a material fact—namely, that an insurance office had refused a proposal for a burglary insurance made by the claimant on the former occasion.

The dispute having been referred to arbitration, the arbitrator found that a false answer had been given to question (*d*), and that the policy had been obtained by suppression or concealment of a material fact, as the insurance company contended. Upon a special case stated for the opinion of the Court:—

Held (by Bankes, Scrutton and Sargant L.JJ.) that there was sufficient ground to support the arbitrator's finding that the refusal by the insurance office of the proposal made by the claimant on the former occasion was a material fact, and that there was sufficient evidence of concealment of that fact.

Held (by Scrutton and Sargant, L.JJ.) that there was evidence to support the finding that the answer to question (*d*) was false (Bankes L.J. expressing no opinion on this point).

Decision of Roche J. reversed.

APPEAL from the decision of Roche J. upon a special case stated by an arbitrator.

In 1916 one Sapsy Glicksman in partnership with his cousin Philip Glicksman started business as a ladies' tailor at 4 Albert Square, Commercial Road, London. S. Glicksman resided on the premises. The partnership lasted for two years. Then P. Glicksman retired, and from 1918 to 1922 S. Glicksman

carried on the business without a partner and at the same premises.

On June 19, 1919, S. Glicksman made a written proposal signed by him to the Sun Insurance Office for the insurance of his stock in trade and other goods on the premises against loss or damage by burglary and housebreaking. His proposal was declined.

Some time in 1922 he took into partnership one H. Roman. On November 9, 1922, he and H. Roman, who were then carrying on the said business at the premises, made a proposal to the Lancashire and General Assurance Company, Ld., for insurance against burglary and housebreaking on their stock and utensils in trade on the said premises in the sum of 1800*l*. The proposal form contained a number of questions of which the following, with the answers thereto, are material :—

"1. . . . . (*b*) Description of premises in which the property to be insured is contained (whether house, shop, warehouse or factory)." Answer: "Sale shop and dwelling-house."

"(*c*) Are you the sole occupier of the premises?" Answer: "Yes."

"2. State rental and how long you have occupied the premises." Answer: "Rental 3*l*. 3*s*. 3*d*. weekly. Occupied 7 years."

"4. (*a*) Are the premises occupied by proposer at night?" Answer: "Yes."

"5. (*a*) How are the outer doors secured?" Answer: "Two good locks and bolt."

"(*b*) How are the front windows on the ground floor protected and fastened?" Answer: "Usual fasteners and wooden shutters."

"(*c*) How are the back windows on ground floor protected and fastened?" Answer: "Ditto."

"(*d*) Are there any skylights? If so how secured inside?" Answer: "Yes, in workshop at rear. . . . ."

"7. Have you previously been insured against burglary? If so, give name of company." Answer: "No."

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"8. Has any company declined to accept, or refused to renew, your burglary insurance, or increased your premium, or required special terms or additional precautions to be taken? If so state name of company and dates." Answer: "Yorkshire accepted, but proposers refused on account of fire proposal. . . . ."

At the foot of the proposal form was a declaration to be signed by the proposer in this form: "I declare that the amount proposed for insurance represents the full value of the property to be insured, and that the above answers are true, that I have withheld no information whatever that might tend in any way to increase the company's risk or to influence the decision of the directors regarding the proposal; and I undertake to exercise all ordinary and reasonable precautions for the safety of the said property. I agree that this declaration and the answers above given shall be the basis of the contract between me and the company, and I further agree to accept a policy subject to the usual conditions prescribed by the company and indorsed on the policy. . . . . Dated November 9, 1922. Signature of proposer S. Glicksman and H. Roman. . . . . Signature of agent N. Cohen."

This proposal was accepted by the Assurance Company, and a policy dated November 27, 1922, was accordingly issued. It contained a proviso "that the statements made by the assured in the aforesaid proposal and declaration are true in all respects, and that if either this policy or any renewal thereof be obtained through any misrepresentation, suppression, concealment or untrue averment whatsoever by or on behalf of the assured . . . . then this policy and any renewal thereof and all claims thereunder shall be absolutely void. . . . ."

By condition 12 indorsed on the policy it was made a condition of the policy that any question, difference, or dispute arising between the company and the assured with reference to the meaning or extent of the contract made by the policy and its conditions, or the amount of any claim thereunder, or the fulfilment of the conditions should be referred to arbitration under the Arbitration Act, 1889, and the obtaining

of an award was made a condition precedent to the liability or obligation of the company to pay and to the right of the assured to recover in respect of any claim under the policy.

S. Glicksman was at all material times unable to read, or to write beyond signing his name. On December 15, 1922, the partnership between him and H. Roman was dissolved, and S. Glicksman took over the business and stock in trade and continued to carry on the business on his own account, residing on the premises with his family. A memorandum dated December 19, 1922, was indorsed on the policy to the effect that the interest therein was thenceforth vested in S. Glicksman alone.

During the period covered by the policy—namely, on the night of Sunday, February 25, 1923—burglars broke into the premises and stole and carried away part of the stock in trade therein to the value of 1656*l.* 6*s.* 3*d.* S. Glicksman made a claim for that amount. Points of claim and defence were delivered; and the difference was then referred to arbitration under condition 12 of the policy. During the reference the arbitrator allowed the Assurance Company by way of amended defence to plead that "It was warranted by the policy that the statements made by the applicant in his proposal in writing dated November 9, 1922, were true in all respects, and that if the policy should be obtained through any misrepresentation, suppression, concealment or untrue averment by or on behalf of the applicant the policy and all claims thereunder should be absolutely void. In the said proposal the applicant in answer to the question 'Has any company declined to accept, or refused to renew your burglary insurance?' stated, 'Yorkshire accepted, but proposers refused on account of fire proposal.' In fact in a written proposal dated June 19, 1919, the applicant had offered his burglary insurance to the Sun Insurance Office and the said Sun Insurance Office had declined the said insurance by letter to the applicant dated June 20, 1919."

The arbitrator having been requested by counsel for S. Glicksman, the claimant, to make his award in the form of a special case in the event of his finding that the claimant

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had suffered loss by burglary, and having so found, stated a special case, which having set out the above facts continued as follows :—

" 13. On the facts and evidence above stated counsel for the respondents "—the Assurance Company—" contended that the answer to the 8th question was untrue and that by reason thereof and of the omission or non-disclosure in the proposal to the respondents of the fact that the claimant's proposal to the Sun Insurance Office had previously been declined, a condition of the policy had been broken or not fulfilled and the respondents were entitled to avoid the contract of insurance contained in the policy and were under no liability to the claimant.

" 14. Counsel for the claimant contended that there was no evidence that the claimant had made any untrue statement in the proposal to the respondents, and no evidence of any breach of a condition of the policy, and further that on the proper construction of the policy and the proposal form to the respondents the proposal was not made by the claimant but by the claimant and H. Roman jointly, and that the fact that another insurance company had previously declined a proposal for burglary insurance made by the claimant solely and individually did not render the answer to the 8th question untrue in fact.

" 15. In my opinion the contentions of counsel for the respondents are correct and the contentions of counsel for the claimant are wrong and, subject to the opinion of the Court . . . . I award that the respondents are under no liability to the claimant in respect of his said loss by burglary. . . . ."

" 17. . . . . The question for the opinion of the Court is whether on the facts and contentions stated in this special case my award that the respondents are under no liability to the claimant in respect of his said loss by burglary is right or wrong.

" 18. If the Court is of opinion that my award is right then my award shall stand. . . . ."

Roche J., before whom the special case was argued, remitted the case to the arbitrator and stated his reasons for so doing

as follows: "Counsel for the Assurance Company raises the point that independently of actual mis-statement or mis-representation, there was concealment, not fraudulent, but a concealment of a matter that was material—namely, the previous doings of the principal partner in this business—and that on the ground of this concealment and the language of the declaration at the foot of the proposal, he is entitled to succeed on the principle of *Becker* v. *Marshall*. (1) I am sending this case back, because I am not satisfied that the arbitrator ever had this matter in mind at all. I think he certainly had the first matter in mind; but, by reason of it not being argued before him very fully and by reason of not having the cases cited to him, he was content, even if this point was present to his mind at all, to deal with the case on the basis of the first point, of the misrepresentation or untruth. . . . . The matter ought to go back to him to consider and to make it clear whether he dealt with it, and how he dealt with it."

The arbitrator thereupon made a supplemental award, which contained the following paragraphs:—

"1. In the arbitration and before I made my award counsel for the respondents raised the point and contended that the policy upon which the claimant based his claim was avoided by the concealment or non-disclosure of the fact that the claimant's proposal to the Sun Insurance Office had previously been declined.

"2. I considered and dealt with the said contention and decided thereon as follows and upon the following grounds:—

"(*a*) That the policy issued by the respondents was obtained by and in pursuance of the proposal form recited therein, and that by reason of the concealment or non-disclosure in the proposal form of the fact that the Sun Insurance Office had previously declined the claimant's proposal as stated in the special case the policy was obtained by concealment and was void under the terms thereof;

"(*b*) That the respondents were entitled to avoid the policy by reason of the concealment or non-disclosure of the material

(1) (1922) 11 Ll. L. Rep. 114.

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fact that the Sun Insurance Office had previously declined the claimant's proposal as stated in the special case."

As evidence in support of his finding the arbitrator in addition to the facts hereinbefore stated relied on the fact "that while no evidence was given directly to the effect that the refusal by the Sun Insurance Office of the claimant's proposal was not communicated to the respondents it was not suggested by him or on his behalf that it was so communicated to the respondents or any person connected with them, and the argument proceeded upon the basis that it was not."

The case then came again before Roche J. who held, even apart from the authority of *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (1) and *Becker* v. *Marshall* (2), that the answer to question 8 was not untrue or inaccurate, so as to avoid the policy. Upon the point of concealment he held on the authority of *Joel* v. *Law Union and Crown Insurance Co.* (3) that it was for the Assurance Company to prove the concealment and that there was no evidence that the refusal of the Sun Insurance Office had not been communicated to Cohen, the agent of the Assurance Company. He therefore gave judgment for the claimant.

The Assurance Company appealed.

Rayner Goddard K.C. and *H. C. Dickens* for the appellants.

Croom-Johnson and *G. Moseley* for the respondent.

[The following cases were cited: *London Assurance* v. *Mansel* (4); *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (1); *Joel* v. *Law Union and Crown Insurance Co.* (3); *Becker* v. *Marshall* (2); *Arthrude Press* v. *Eagle, Star, &c., Insurance Co.* (5); *Ehrig* v. *Transatlantic Fire Insurance Co.* (6).]

BANKES L.J. This is an appeal from a decision of Roche J. upon a special case stated by an arbitrator. The case was stated in reference to a claim by an assured against the

(1) [1891] A. C. 485.
(2) 11 Ll. L. Rep. 114.
(3) [1908] 2 K. B. 863.
(4) (1879) 11 Ch. D. 363.
(5) (1924) 19 Ll. L. Rep. 373.
(6) Transvaal L. R. [1905] T. S. 557.

Assurance Company. The claimant alleged that he had suffered a loss by a burglary and that that loss was covered by his policy. The Assurance Company disputed the claim, and insisted in the first instance as their main defence before the arbitrator that there had been no burglary at all. But having regard to an answer given by the claimant, they asked and obtained permission to raise the point that they were entitled to avoid the policy upon the ground that one of the statements of the claimant in the proposal form was untrue, and also upon the ground that there had been a suppression by the claimant of a material fact. This last case was made at a very late stage. The arbitrator was asked to amend the points of defence which had been put in, and he allowed the amendment, which was then formally drafted and accepted as part of the Assurance Company's case. That amendment, in my opinion, clearly raises the two points, the alleged false statement and the alleged suppression of a material fact, the material fact being that the proposer, the claimant, had some years before made a proposal for a burglary insurance upon his property in these same premises, which had been refused. The arbitrator found both the points raised by amendment in favour of the Assurance Company, but the claimant contended that, as a matter of law, partly on the construction of the proposal form and partly on the sufficiency of the evidence, he was entitled to succeed, and thereupon a special case was stated by the arbitrator. The case came before Roche J., who not being satisfied that the arbitrator had found against the claimant upon both the points raised by the amendment, sent the case back to him, and the arbitrator, in response to a request to that effect, stated that he had found against the claimant upon both the points, and set out the grounds of his decision. The matter then came before Roche J. on a second occasion, and the learned judge came to the conclusion first that, having regard to the form of the question, it could not fairly or properly be said that the claimant had made any untrue answer; and, secondly, that there was no evidence of any suppression of a material fact upon the

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ground, as I understand it, that the Assurance Company had not called their agent to say that he had not been told of the refusal of the previous proposal for insurance. It is from that decision that this appeal is made.

The material facts can be stated quite shortly. This claimant started business as a ladies' tailor in these premises, 4 Albert Square, in 1916. He had a partner at that time or shortly afterwards, a relative named P. Glicksman, who continued to be his partner until 1918, when the partnership was dissolved. In 1919 the claimant made a proposal to the Sun Insurance Office for a burglary policy, and he was asked then to give his address and to state what the premises consisted of, and questions were asked in the proposal form, whether the premises were left unoccupied, and what the nature of the premises was, that is to say, how the outer doors, front windows, back windows, back doors, and so on were secured and protected—making it quite plain at any rate that in the proposal the insurance office attached great importance to the character of the premises and the security and protection they afforded. Now that proposal was put forward, and it was refused. Upon what ground it was refused no evidence was given. That was in 1919. In 1922 the claimant took into partnership a man named Roman, and in November of that year the partners made a proposal to the Lancashire and General Assurance Company for a burglary policy. The proposal is dated November 9, 1922. How long Roman had been a partner and what the terms of the partnership were we do not know. We only know that about a month after the making of this proposal the partnership was dissolved. I do not attach any importance to that; I treat the case as one in which, at the material time, that is to say at the time when the proposal was made, the claimant had a partner of the name of Roman. Now the proposal is made upon a printed form in which the proposer is treated as being an individual; it speaks of the proposer in the singular; the first blank that has to be filled in is the name of the proposer in full, and the proposer is stated to be "S. Glicksman and H. Roman." Whether they were

partners or not is not stated, but these two gentlemen are entered as being the "proposer." Then the address is given in full: "4 Albert Square, Commercial Road," and the business is given as "Ladies' tailor." Then come a series of questions. The first is this: "Address of premises to which the insurance is to apply." Answer: "Above address." "Description of premises in which the property to be insured is contained; whether house, shop, warehouse or factory." Answer: "Sale shop and dwelling-house." "Are you the sole occupier of the premises?" Now "occupier" is in the singular, but "are you" being addressed to the proposer, who is stated to be Glicksman and Roman, one would assume the question "Are you" is addressed to Glicksman and Roman, the persons who state that they are the proposer. "Are you the sole occupier of the premises?" The answer is "Yes." We do not know whether that was the fact or not; all we know is that the shop was the place in which the partnership was being carried on, and the dwelling-house was a place where the claimant lived with his family; we do not know where Mr. Roman lived. However, it may or may not be a correct way to answer, "Are you the sole occupier of the premises?" The next question is: "State rental and how long you have occupied the premises." There again one would think prima facie that is a question addressed to Glicksman and Roman. The answer is: "Rental 3*l.* 3*s.* 3*d.* weekly; Occupied 7 years." That answer can only be true of the claimant, because Mr. Roman had had nothing to do with the matter except for a few months before the proposal was made, or a few weeks possibly; therefore that answer is obviously filled in as an answer to a question addressed to the claimant. Then the next question is: "Are the premises occupied by the proposer at night?" "Yes." As far as one can judge, that is only accurate of the claimant. Then there are questions showing the great importance attached by the Assurance Company to the security of the premises and the available means of protecting them: whether a watchman is employed, whether the outer doors are secured, and so forth—the same class of information that the Sun

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Insurance Office required. Then comes the material question, (8.) "Has any company declined to accept, or refused to renew your burglary insurance, or increased your premium or required special terms or additional precautions to be taken?" That is a question which the claimant has to answer. He has already answered some of the questions as though the "you" in the question referred to him particularly, and he has given answers which are only true as applicable to himself; and if he realized that some of his answers were only true if the person answering to "you" was the claimant himself and no one else, he cannot be surprised if he is charged with giving a false answer when he is asked whether any company has declined to accept "your" burglary insurance and he in substance says "No." Roche J. has, I think, taken a charitable view of the matter and said that the questions are so framed that it would not be fair to say that this was an untrue answer, because it would be literally true if the question were addressed to the two persons who appear as the proposer. No proposal made by them jointly had been refused. If that point had stood alone, I should have liked time to consider whether I could agree with the view of Roche J. or not, but personally I think on the other point the answer to the question in the special case is reasonably plain.

The other question is whether there was any concealment or suppression. In my opinion there clearly was evidence of the suppression of a material fact. I am unable to accept the argument that has just been addressed to us by counsel for the claimant that the amendment does not raise this question. It raises it quite clearly. There was moreover abundant evidence before the arbitrator that the refusal by the Sun Insurance Office to accept the proposal was a material fact. In a burglary proposal the position and the condition of the premises in which the articles to be insured are contained is necessarily a very material fact. It does not require some one to come and say: "In my opinion, in a burglary policy the question whether the premises have got bolts and bars, or whether they have watchmen, or where

they are situated, is a material question." That is plain on the face of things where the application is for a burglary policy. Another material question is whether the claimant's insurance has been refused by another office or by other offices. That this question is material is obvious from the questions which are directed to that particular matter, not only in this proposal form but in the proposal form of the Sun Insurance Office and, I have no doubt, in many other offices also. Then the question is: Is there any evidence of a suppression of this material fact? With great respect to the learned judge, I am really unable to follow his argument upon that point, for this reason: given the facts: (1.) that the proposal was made to the Sun Insurance Office; (2.) that it was material; and (3.) that no mention is made of it in the answer to question 8, it follows that there is evidence of the suppression of a material fact. The evidence consists of the fact that the statement of the truth is not where it ought to be, there is no statement in answer to the question, as there ought to be; and it follows, therefore, that there is evidence of a suppression; and so far from the onus being where the learned judge placed it, the answer on the form being silent on that very material fact, it was for the claimant to say: "There is no suppression, because I told the agent," before the Assurance Company were bound to call their agent to say he did not know it. On that ground it seems to me there was evidence upon which the learned arbitrator could find as he has found, first of all that the fact was material and, secondly, that there was suppression of it. Under those circumstances I think the appeal succeeds, and the answer to the special case must be that the learned arbitrator was entitled to find as he did, with the consequences indicated in the special case itself, and the appeal must be allowed with costs.

SCRUTTON L.J. I am of the same opinion. Mr. Sapsy Glicksman had claimed on an insurance policy in respect of a burglary. It is fair to him to state at the outset that the Assurance Company accused him of a fictitious

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or fraudulent burglary, that they failed to prove it, and that the arbitrator has found that there really was a burglary and ordered them to pay the costs of that issue, and Mr. S. Glicksman's character is completely cleared of that serious accusation by the finding of the arbitrator. But in the course of the proceedings it appeared that Mr. S. Glicksman had put forward a proposal to the Sun Insurance Office for the insurance of these premises and that the proposal had been refused; that in the proposal form, the truth of the answers to which is made a condition of the validity of this policy, when the question was asked: "Has any company declined to accept or refused to renew your burglary insurance?" he had not stated the refusal by the Sun Insurance Office, but had mentioned a proposal to the Yorkshire Insurance Company which for immaterial reasons had not been pursued. In these circumstances the Assurance Company obtained leave to amend their defence by alleging the condition that the policy should be invalidated if it was obtained by "any misrepresentation, suppression, concealment or untrue averment," and then putting forward the answer to the question and the fact that the proposal to the Sun Insurance Office had been refused. Now I wish to say that I think it is a great pity that insurance companies do not make this question plainer. They may know that the Privy Council has given a decision on a form of a question something like this, and that the Transvaal Court of Appeal (1) has adopted the decision of the Privy Council, but ordinary proposers for insurance do not know this; and therefore it would be well if insurance companies, who know of the ambiguity in the wording of their question, would alter it so as to make it clear what they mean when the proposal for insurance is made by a firm. Is the question limited to the previous experience of the firm, or does it include that of each partner in the firm? In this case the facts were that Mr. S. Glicksman, the claimant, and Mr. P. Glicksman had been carrying on business as tailors in these premises for two years from 1916 to 1918. Then P. Glicksman went out,

(1) *Ehrig* v. *Transvaal Fire Insurance Co.*, Transvaal L. R. [1905] T. S. 557.

and from 1918 to 1922 S. Glicksman carried on the business in the same premises. In 1922 he took a partner, Mr. Roman, who was carrying on business when the policy was effected, but who shortly afterwards went out. It was the same business, in the same premises, but carried on by the claimant sometimes alone and sometimes with a partner. The questions in the proposal form continually use the word "you," and when the claimant was asked: "How long have you occupied the premises?" he said: "Seven years"; which is quite true if "you" means the claimant alone—Mr. Glicksman had occupied the premises seven years; but it is not true if "you" means the partners "S. Glicksman and H. Roman," who were the proposers, because they had occupied the premises for less than one year. Then comes the question: "Are the premises occupied by proposer at night?" S. Glicksman had a dwelling-house on the premises, but H. Roman had not, and the premises were occupied at night by S. Glicksman, and not by S. Glicksman and H. Roman. So that in the earlier questions "you" is being treated as if it applied to S. Glicksman. Then comes the question: "Has any company declined to accept, or refused to renew, your burglary insurance?" and that question is answered, if it is answered truthfully, by making "your" apply to both and not to S. Glicksman alone. What is the effect of that? Counsel for the claimant admits that he would have been in a difficulty if the Assurance Company had alleged that the answer to question 2 was untrue, but that fortunately they did not do that; they alleged that the answer to question 8 was untrue; but, according to the decision of the Transvaal Court of Appeal, that answer is true. The arbitrator, reading all the questions and all the answers, and knowing the facts, has inferred that the parties intended to treat "you" as applying to you or any one of you. This would make the answers 2 and 4 true. That being the construction to be put on the word "you" in this particular policy, answer 8 is untrue; and he states a special case in which the question is, whether this construction is wrong? I cannot say it is. I think he was entitled to

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take that view of the whole of the proposal form, and that being so, the policy is invalidated by the untrue answer to question 8. As I gather, Roche J. took the view that in accordance with *Davies* v. *National Fire and Marine Insurance Co. of New Zealand* (1), the 8th question related only to the partnership. He did not consider the effect of the 2nd and 4th answers showing the sense which the proposer was giving to the word "you"; and it is on this ground that I differ from the learned judge on the matter of the misrepresentation. But I hope insurance companies will try and avoid this difficulty in future.

But there is a second ground on which the policy may be attacked. It is said that apart from any positive misstatement in the answers to the questions there has been a concealment or, at any rate, a non-disclosure of the fact that the claimant's insurance was refused by the Sun Insurance Office. There is undoubtedly some little difficulty in this matter, because in marine insurance it is not treated as material to know that the risk has been refused by other underwriters or that they have asked a higher or a smaller premium. In the judgment of Lord Esher M.R. in *Lebon & Co.* v. *Straits Insurance Co.* (2) there appears this passage: "It was admitted that, as a general rule, the assured was not bound to state what another underwriter had said, as that he had refused to take the risk; or even that a week after he had accepted the insurance he had expressed a wish to be released." Founding myself upon that and upon my own knowledge of marine insurance I said in *Glasgow Assurance Corporation* v. *Symondson & Co.* (3): "The ordinary man in the street would, I am sure, think it material to know that the risk he was offered had been previously refused by six other underwriters; and many life insurance offices expressly ask the question: 'Has your life been refused by any other office?' But it is elementary marine insurance law that such refusals need not be disclosed to another underwriter The ordinary business man would, I am sure, think it materia

(1) [1891] A. C. 485.
(2) (1894) 10 Times L. R. 517, 518.
(3) (1911) 16 Com. Cas. 109, 119.

to know that the underwriter wanting to reinsure thought so badly of the risk that he was ready to pay a higher premium than he received to get rid of [it]; but no one has ever suggested that this need be disclosed." And so far as marine insurance is concerned, it is generally accepted that the material facts are those relating to the nature of the risk, and not those relating to the judgment of other people, about what premium is to be charged. There is also no doubt that both in life and burglary insurances the insurance offices make it plain to the assured that they think it material to know whether anybody else has refused the risk. The question nearly always appears in some form or other in the proposal forms of those offices. And in my view, when it is shown to the assured that the underwriter is treating a certain fact as material, he comes under an obligation to disclose any fact of that character. Here the proposer did not disclose a fact which the underwriter had shown that he thought was material. Upon this question of concealment I have already said that I cannot accept the view of the learned judge that the 8th question was understood as addressed only to the partnership. There remain two other points which were argued before him: (1.) that before a Court can find that a fact is material, somebody must give evidence of the materiality. That is entirely contrary to the whole course of insurance litigation; it is so far contrary that it is frequently objected that a party is not entitled to call other people to say what they think is material; that is a matter for the Court on the nature of the facts. I entirely agree with Roche J., that the nature of the facts may be such that you do not need anybody to come and say, This is material. If a shipowner desiring to insure his ship for the month of January knew that in that month she was heavily damaged in a storm, it would, with deference to counsel who has suggested the opposite, be ridiculous to call evidence of the materiality of that fact; the fact speaks for itself. But the ground on which the learned judge decided against the objection of concealment was that no evidence had been given that the proponent had not told Cohen this fact. Now

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the grounds on which I differ from the learned judge on that point are, first, that in the supplementary award the arbitrator states that "The argument before me proceeded on the basis that the matter was not communicated." When the argument before the arbitrator has proceeded so far and a special case has been stated, I think it is much too late to complain that evidence was not called to establish positively that the matter was not communicated: the matter was argued on the basis that it was not communicated. Secondly, I wish to say that when a question is asked in answer to which this fact ought to have been stated and was not stated, there is then a prima facie case of non-disclosure, and the person who wishes it to be understood that though he did not communicate it in the form in which he was asked to communicate it, he did communicate it in another way, has, I think, the burden put upon him of coming and proving that he did so.

For these reasons I think that Mr. Glicksman fails, because of the answers which he has given and the answers which he has not given to the questions asked of him as the basis of the insurance.

SARGANT L.J. I agree that the appeal should be allowed. As regards the question of false statement in the answers of the proposer, it appears to me that the answers should be considered not only separately but together, and their joint effect should be appreciated. The effect of the answer to question 2 relating to the length of occupation of the premises indicates quite clearly that the persons who were answering the question considered that the word "you" applied not only to the two persons who had been in partnership for the comparatively short period of a few months, but applied also to the predecessor in business of those two persons—namely, the principal partner and present claimant, S. Glicksman. That answer having been given, and the meaning of the word "you" having been indicated in that answer, it seems to me that the answer to the question 8, "Has any company declined to accept, or refused to renew, your

burglary insurance?"—a negative answer in effect though not in terms—is a false answer, because the principal partner, the partner who had been carrying on the business during the four years previously, and who had only taken a junior partner in for a comparatively brief period, had in fact made a proposal of the kind and had had the proposal declined. In my view, therefore, the learned arbitrator was entitled to find as he did find, that a false statement was contained in the answer so given to the very important question 8.

With regard to the matter of concealment I need say very little. It seems to me that not only in life assurance and burglary insurance, but also in fire insurance, it has for very many years been considered an essential element in estimating the risk, to know what the estimation of other persons in the same class of business has been with regard to that risk, at any rate to the extent of ascertaining whether the risk has been offered to and declined by competitors in that class of business. Fire, life, and burglary insurances seem to differ from marine insurance in this respect; the importance which insurers against those risks attach to the opinion of other offices is evidenced by the very specific questions on that subject which are asked in ordinary practice and which appear plainly set forth in the proposal form in this particular case. That being so, the fact that in the written answers to the questions in the proposal form, which are to be the basis of the policy and which prima facie contain the statements made by the proposer to the Assurance Company, no mention whatever is made of the important fact that some three years before a proposal for burglary insurance on these very premises and in respect of the very class of business which was still being carried on there, had been declined by an insurance office, is at any rate some prima facie evidence of concealment, and indeed sufficient evidence upon which the learned arbitrator might find as he did that there was a concealment vitiating the policy; and if the claimant desired to set up as against that silence in the written proposal a verbal statement to the agent of the Assurance

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Company, it was for him to bring forward evidence to prove that verbal communication, and in default of his doing so, or indeed suggesting before the learned arbitrator that there had been any such verbal communication, it seems to me that there was prima facie evidence before him on which he was entitled to come to the conclusion that there was concealment of a material fact.

Appeal allowed.

Solicitors for appellants: *Coward, Chance & Co.*
Solicitor for respondent: *F. J. Rutledge.*

W. H. G.

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[IN THE COURT OF APPEAL.]

R. E. JONES, LIMITED *v.* WARING AND GILLOW, LIMITED.

Bill of Exchange—Cheque obtained by Fraud of third Party—Payee "holder for value"—Payment of Cheque—Action by Drawer to recover Money—Money "had and received"—Failure of Consideration—Mistake o Fact.

B. by false pretences induced the plaintiffs to draw a cheque for 5000*l.* payable to the defendants or order. B. procured the cheque to be sent to the defendants, who were ignorant of B.'s fraud, and B. on the strength of the cheque obtained value from the defendants to the extent of 5000*l.* The defendants, who were bona fide holders for value, presented the cheque to their bankers for clearance and it was duly honoured. Later, the false pretences were discovered and the plaintiffs brought an action against the defendants to recover the 5000*l.*:—

Held, by the Court of Appeal, reversing the decision of Lord Darling, that the action must fail, because—

(1.) in the absence of proof that B. was the agent of the defendants, th re was no direct transaction between the plaintiffs and defendants and, therefore, the plaintiffs could not recover the money as "had and received" to their use;

(2.) the money could not be recovered on the ground of failure of consideration, as there had never been any contract or legal relationship between the plaintiffs and defendants; and

(3.) the defendants having received the cheque bona fide from B., with whom they had a legal relationship, and not having themselves contributed to any mistake, were not liable to repay the money as having been paid to them under a mistake of fact.

Watson v. *Russell* (1862) 3 B. & S. 34; (1864) 5 B. & S. 968 applied.

Per Scrutton L.J.: Where A. has no legal relationship with B., but receives B.'s money for valuable consideration and bona fide from C., with whom A. has a legal relationship, A. can keep the money so obtained from B. under a mistake of fact if he was not a party to that mistake and did not contribute to it.

Quaere, whether, if in the present case the mistake had been discovered before the defendants cashed the cheque, the defendants could not have recovered the money in an action brought by them as payees against the plaintiffs as drawers, even though the cheque were marked "not negotiable," because, as between drawer and payee, those words would not affect a right of action.

Appeal from a decision of Lord Darling sitting as a judge of first instance without a jury.

The plaintiffs, who were caterers and motor car dealers, sued the defendants to recover 5000*l.*, the proceeds of a cheque for that amount drawn by them in favour of the defendants, (*a*) as money had and received to their use by the defendants, or (*b*) as money paid for a consideration which had failed, or (*c*) as money paid under a mistake of fact, in the following circumstances: One, Bodenham, who was indebted to the defendants for furniture supplied to the extent of 10,000*l.*, on December 23, 1919, called upon the managing director of the plaintiff company and, representing that he was the agent of "International Motors," a firm manufacturing "Roma" motor cars, which (he falsely stated) had the defendant company or their directors behind it, whose offices he used, asked the plaintiffs to become agents for the cars in South Wales and the South and West of England. Induced by these representations, the managing director, on behalf of the plaintiff company, entered into an agreement on December 31, 1919, for the purchase of 500 "Roma" cars, and agreed to pay 5000*l.* as a deposit of 10*l.* on each car. Two cheques were drawn, both payable to the defendants, one for 2000*l.* dated December 31, 1919, and the other for 3000*l.*, but post-dated. These cheques were handed to Bodenham, and he thereupon gave them to the defendants, who on the previous day had issued a writ against him for recovery of 5000*l.* on a dishonoured cheque which he had given them on account of the furniture. On

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receipt of the two cheques the defendants' accountant telephoned to the plaintiffs inquiring whether the cheques were in order, as they were signed by one director only, and, being satisfied on this point, he telephoned later saying that the defendants could not accept the post-dated cheque, and the plaintiffs sent a fresh cheque for 5000*l.* drawn, at Bodenham's suggestion, in favour of the defendants, crossed and marked "not negotiable." The two cheques for 3000*l.* and 2000*l.* were returned to the plaintiffs. The defendants paid the cheque for 5000*l.*, which was duly honoured, into their bank, and they advised the plaintiffs that they had received the money on account of Bodenham and would send him a receipt. Shortly afterwards Bodenham was arrested on another charge, and the present fraud was discovered.

Lord Darling gave judgment for the plaintiffs for 5000*l.* as money had and received to their use, there being no consideration and the money having been paid under mistake of fact.

The defendants appealed. The appeal was heard on February 18, 19, and 20, 1925.

The history and a more detailed statement of the facts relative to the case, and of the trial in the Court below, are set out in the following judgment of the Master of the Rolls.

Jowitt K.C. and *Woodgate* for the appellants. Where B. by false pretences procures J. to give him a cheque either (*a*) in favour of B. or order, and B. takes it to W. and gets goods on it, or (*b*) in favour of W., to whom B. gives the cheque and who supply him with goods, J. cannot in either case recover the money: *Watson* v. *Russell* (1); Bills of Exchange Act, 1882, s. 27, sub-s. 2; s. 81; Chalmers' Bills of Exchange, 8th ed., p. 301. In this case Waring & Gillow are bona fide holders for value and the plaintiffs cannot recover the money.

Eustace Hills K.C. and *P. B. Morle* for the respondents. If Waring & Gillow had sued the plaintiffs on this cheque mistake of fact and failure of consideration would have been

(1) 3 B. & S. 34; 5 B. & S. 968.

complete answers. The appellants are not holders in due course because they were payees and never became holders of it in due course; it was never negotiated to them.

[SCRUTTON L.J. Waring & Gillow became the holders of the bill under s. 31, sub-s. 1, of the Act.]

The words "in due course" involve intermediate dealings.

[POLLOCK M.R. There was a negotiation of the bill under s. 31, sub-s. 1, by the drawing of the bill and the handing of it to the payee.]

The rights which Waring & Gillow had can never be the rights of holders in due course because they had never been negotiated or transferred to them. Under s. 29, sub-s. 1 (*b*), they have to show that they took the bill in good faith and for value, and that at the time the bill was negotiated to them they had no notice of defect in the title of the person who negotiated it; Waring & Gillow never came within those words, because under s. 31, sub-s. 1, a bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill, and a bill payable "to order," as this was, is by sub-s. 3 negotiated by the indorsement of the holder completed by delivery. Waring & Gillow's rights were only those as between the two parties to the bill, and they were affected by any defect in title, and the defect consisted in there being no consideration for the cheque, which would not only be a good defence to an action on the cheque but would entitle the plaintiffs to recover the money paid.

In *Lloyds Bank, Ld.* v. *Cooke* (1) it was stated obiter that the payee might be the holder in due course, but in *Lewis* v. *Clay* (2), discussed in *Herdman* v. *Wheeler* (3), there was a dictum that a payee was never a holder in due course.

This is an action for money had and received to the use of the plaintiffs. Bodenham was the agent to pay it, and he was the agent of Waring & Gillow and not of the plaintiffs. There was, therefore, a direct transaction between Waring & Gillow and the plaintiffs.

(1) [1907] 1 K. B. 794. (2) (1897) 67 L. J. (Q. B.) 224.
(3) [1902] 1 K. B. 361.

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Again, the cheque was given upon the supposition that a specific fact was true within the test given by Parke B. in *Kelly* v. *Solari*. (1) The plaintiffs believed the representation that Bodenham was the agent of Waring & Gillow, and are entitled to recover: *Baker* v. *Courage & Co.* (2); *Colonial Bank* v. *Exchange Bank of Yarmouth, Nova Scotia* (3); *Holt* v. *Markham*. (4) *Watson* v. *Russell* (5) turned partly upon the fact that the intermediary who was given the cheque to hand to Russell was given it for the purpose of meeting his own individual debt, but in this case the plaintiffs did not give Bodenham any interest in the cheque. If this representation had been true, the plaintiffs would have been liable to pay the money, and so, as it was untrue, they are entitled to recover it: per Bramwell B. in *Aiken* v. *Short*. (6)

Waring & Gillow, having received this money, are liable to return it if it was in fact paid to them as principals under a mistake of fact, and they have not altered their position: *Kleinwort, Sons & Co.* v. *Dunlop Rubber Co.* (7); *Continental Caoutchouc and Gutta Percha Co.* v. *Kleinwort, Sons & Co.* (8) Bodenham was not the agent or servant of the respondents; he purported to act as the agent, and the cheque was given to him as the agent of Waring & Gillow, who were the principals.

Further, there never was any consideration for the cheque between the immediate parties. There is no distinction between absence and failure of consideration: Chalmers' Bills of Exchange, 8th ed., p. 105. The money was paid without any consideration, and just as in the case of the purchase of an annuity when the annuitant is already dead, as in *Strickland* v. *Turner* (9), can be recovered. Under s. 27 the consideration must be between the parties to the cheque; it is no good for Waring & Gillow to say that they gave the consideration to Bodenham.

The plaintiffs were not guilty of any negligence or lack of inquiry after the transaction had been completed which would

(1) (1841) 9 M. & W. 54, 58.
(2) [1910] 1 K. B. 56.
(3) (1885) 11 App. Cas. 84.
(4) [1923] 1 K. B. 504.
(5) 3 B. & S. 34; 5 B. & S. 968.
(6) (1856) 1 H. & N. 210, 215.
(7) (1907) 97 L. T. 263.
(8) (1904) 9 Com. Cas. 240.
(9) (1852) 7 Ex. 208.

constitute an estoppel against them. They never waived any inquiry, because there was nothing to put them on inquiry. Waring & Gillow delivered further furniture on the fraudulent statement of Bodenham that the money was his, and not through any breach of duty or negligence on the part of the plaintiffs raising an estoppel by conduct.

Jowitt K.C. in reply. For repayment of money paid under mistake of fact either (1.) it must be established that the mistake was as to a fact which if true would have rendered the person liable to pay: *Kelly* v. *Solari* (1); *Aiken* v. *Short* (2); *Chambers* v. *Miller* (3); or (2.) the case must possess one or other of these three requirements: (*a*) the mistake must be common to both parties, or (*b*) the defendant must have contributed to the mistake or been aware of it, or (*c*) the defendant's position must not have been altered to his detriment in consequence of the payment.

This particular case comes under a different branch of the law altogether, and the principle upon which it can be decided is the same as in *Watson* v. *Russell* (4), referred to with approval by Vaughan Williams L.J. in *Talbot* v. *Von Boris.* (5) Bodenham by means of a false pretence procured this cheque from the plaintiffs, drawn in favour of Waring & Gillow, who accept it, and the plaintiffs are liable to pay. The plaintiffs let this man loose with a cheque which they signed, and the payees are entitled to rely upon it, and are entitled to the money. Waring & Gillow were holders for value under s. 27, sub-s. 2: *Munroe* v. *Bordier* (6); Chalmers' Bills of Exchange, 8th ed., p. 112, example 2. Bodenham was not the agent of Waring & Gillow; if he was any one's agent, he was agent for "International Motors."

The mistake that was made, was made by the plaintiffs in thinking Bodenham an honest man and in trusting him with the cheque without making inquiries.

POLLOCK M.R. This is an appeal from a decision of

(1) 9 M. & W. 54.
(2) 1 H. & N. 210.
(3) (1862) 32 L. J. (C. P.) 30.
(4) 3 B. & S. 34.
(5) [1911] 1 K. B. 854, 861–2.
(6) (1849) 8 C. B. 862.

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Lord Darling, who entered judgment for the plaintiffs for 5000*l.*, the sum for which the action was brought.

The case involves a somewhat intricate succession of facts, and comes within a sphere of the law where the lines are not very clearly marked. We have had presented to us arguments on both sides with great ability by counsel; and I should like to say on behalf of the Court that we have derived real assistance from those arguments. One can only apply the law to this case when one has disentangled the facts and come to a proper decision in regard to the relationship between the parties. In order to do that, it is necessary to state the facts at some length, which I will do, so far as I can, with some precision.

The defendants in the case are Messrs. Waring & Gillow, the well-known firm who carry on business as furniture dealers, etc. A Mr. Bodenham, who lived somewhere in the Midlands, got into touch with them and gave them orders for furniture. Towards the end of November, 1919, the value of the furniture which he had ordered from Messrs. Waring & Gillow was very considerable—between 8000*l.* and 10,000*l.* In December, 1919, Bodenham gave Messrs. Waring a cheque for 5000*l.*, which was not met. On December 13 that cheque was returned unpaid for the second time. Now, it appears that Bodenham, who we learn is now undergoing a sentence of penal servitude, had told Messrs. Waring & Gillow that he anticipated there would be a sum of money coming to him from either Cardiff or Swansea—and he wrote them on December 22, 1919, this letter: "I tried yesterday to get you on the 'phone but failed, and could not call again without missing my train. Had a director been in town for his cheque signature, I should have been successful in giving you draft for the full amount of 5000*l.* as I hinted at during our conversation. I am promised this on Monday morning. This is, of course, a clearer course, and much more satisfactory to all. I will bring this round to you, and being a London cheque you will be able to immediately satisfy yourself thereon. Thanking you for your consideration." Well, the money did not come, and on December 30, 1919, Messrs. Waring &

Gillow issued a writ against Bodenham in respect of the 5000*l.* dishonoured cheque. The furniture which had been supplied by Messrs. Waring & Gillow had been made the subject of a hire-purchase agreement, dated November 28—because when they found that the full payment for the furniture was not forthcoming, they thought it better to protect themselves by a hire-purchase agreement—which gave them the right to retake the furniture if the terms of the hire-purchase agreement were not fulfilled. And on December 30 they not only issued a writ upon the 5000*l.* dishonoured cheque, but they also retook possession of the furniture, which was packed up in vans and taken to the railway station. The writ was served on that day, December 30. On December 31 Bodenham came to Messrs. Waring & Gillow with two cheques in his hand—the two cheques we have before us. One of those cheques was dated December 31 and was drawn by the plaintiffs for 2000*l.* to Messrs. Waring & Gillow or order. That cheque was a crossed cheque, but had not a restrictive indorsement upon it, such as "not negotiable" or anything like that. The other cheque was a cheque for 3000*l.* and was also drawn by the plaintiffs to Messrs. Waring & Gillow or order under similar circumstances to the 2000*l.* cheque—but that cheque was post-dated January 14. Those two cheques were brought to Messrs. Waring & Gillow on December 31. The purpose of that was this: Bodenham was doing what he had undertaken to do in the letter which I have just read—namely, to place in the hands of Messrs. Waring & Gillow a sum directly payable to them—cheques which could be cashed practically immediately. Messrs. Waring & Gillow were not surprised when he handed them those two cheques, but they were somewhat surprised to find that they were not two London cheques—they were drawn on the Swansea branch of Lloyds Bank, Ld. In addition to that, instead of them being signed by two directors, they were only signed by one director—although the word "directors" is to be found printed on them. In addition to that there is the word "Secretary" printed upon the cheque—indicating that the secretary's

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signature should be upon them—but it was not. Messrs. Waring & Gillow looked somewhat narrowly upon those two cheques—Mr. Barclay, who was the accountant or cashier of Messrs. Waring & Gillow, was not satisfied with the form of the cheques. I am going through the story now as set out in the plaintiffs' statement of claim, where they say: "On the 31st December, 1919, after the cheques had been handed to the defendants as aforesaid, the said Barclay telephoned to the plaintiffs and asked if the said cheques were in order inasmuch as they had been signed by one director only on behalf of the plaintiffs, and was informed that arrangements had been made with the plaintiffs' bankers for payment of the same. Later on the same day the said Barclay again telephoned to the plaintiffs and stated that the defendants could not accept the said cheque for 3000*l.* because it was post-dated, whereupon the plaintiffs promised"—that was on the telephone—"to send on a fresh cheque signed by the two directors for the whole of the 5000*l.* on condition that the defendants returned the two cheques already handed over." Bodenham then got the cheque for 3000*l.* from Messrs. Waring & Gillow, and he "on the same day returned the said cheque for 3000*l.* to the plaintiffs." That was handed back to them. That is how the matter stood on December 31. There was obvious care, therefore, on the part of Messrs. Waring & Gillow to see that the cheques they were given were in order. The plaintiffs said that if the 3000*l.* cheque was returned they would send a fresh cheque signed by two directors for 5000*l.* payable at once. It was on that understanding that the cheque for 3000*l.* was returned. With regard to the cheque for 2000*l.* that was dealt with in this way. It was paid into Messrs. Waring & Gillow's account—but it was got back before it was presented, and ultimately that cheque was returned to the plaintiffs.

On December 31 Bodenham called at the premises of Messrs. Waring & Gillow and asked to be allowed to write a letter there. They thereupon gave him a sheet of notepaper bearing their impress upon it, and he then wrote this letter to the plaintiffs: "Regarding the cheques given me to-day,

there appears to have been a misunderstanding over the 'phone. The current dated cheque for 2000*l.* is being passed through "—that is, through Messrs. Waring & Gillow's bank —" and you will please arrange with your bankers re signature. The other for 3000*l.* which I returned to you by my own hand you will please send another for to-morrow, Thursday, addressed to me here please, so that I get it on Friday morning." But instead of that course being adopted as suggested in that letter, the course which was adopted was the one set out in the paragraph of the statement of claim, which I have just read. The cheque for 2000*l.*, which was paid in and which is shown as having been paid in by the slip which we have before us, was recovered before it was presented.

Then on January 1 a letter was written by Mr. Stanley Jones, of the plaintiffs' firm, to the chief accountant of Messrs. Waring & Gillow, in which letter Mr. Stanley Jones says: "We received a telegram from our Bond Street Depot "—this letter was written from Swansea—" Waring and Gillow have paid into their bank cheque for 2000*l.*—want further cheque for 3000*l.* Letter from me in post. Collins. We do not think it is worth while to advise the bank to meet cheque bearing only writer's signature, but are sending you instead, as arranged with your chief accountant, cheque for 5000*l.*" Now that appears to be a confirmation from the Swansea office of the plaintiffs of the arrangement which had been made in London on December 31 between the London house of the plaintiffs and Messrs. Waring & Gillow, that a cheque for 5000*l.* was to be sent in place of the two cheques which had been previously handed to Messrs. Waring & Gillow.

In reply to Mr. Stanley Jones' letter of January 1, Messrs. Waring & Gillow wrote on January 2: "We have to acknowledge receipt of your letter of the 1st inst. enclosing cheque for 5000*l.* on behalf of Mr. F. E. Bodenham, of Birmingham. We are accordingly handing Mr. Bodenham our official receipt for the money paid on his behalf. We regret exceedingly the little misunderstanding over the question of the previous cheque, and have to thank you for

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your courtesy in forwarding us the cheque for the whole amount." Messrs. Waring & Gillow then on January 5 sent to Bodenham an official receipt for 5000*l.* "on account of your hire-purchase agreement, being the amount paid to us on your behalf by Messrs. R. E. Jones, Ld." Pausing there, it is quite plain that Messrs. Waring & Gillow had taken steps to secure not merely from Bodenham the payment of 5000*l.*, but that they had questioned the mode of the payment. They immediately paid in the 2000*l.* cheque, and it was at the instance of the plaintiffs that they recalled that cheque, and they were then sent a cheque for 5000*l.* Messrs. Waring & Gillow wrote direct to the plaintiffs saying that they accepted the cheque, the 5000*l.* cheque, as being paid to them on behalf of Bodenham. On January 2, 1920, the 5000*l.* cheque was in due course paid in to Messrs. Waring & Gillow's bank. On the paying-in slip there are these words: "Special clearance re Bodenham." As I have said, that cheque was paid in immediately to Barclays Bank by Messrs. Waring & Gillow, and the 5000*l.* which Messrs. Waring & Gillow thus received is the subject matter of this action.

Before I pass away from that, I think I had better read the plaintiffs' own account of what I have been just describing. In para. 5 of the statement of claim the plaintiffs say: "By letter dated the 31st December, 1919, from the said Bodenham to the plaintiffs written with the permission of the defendants on the official notepaper of the defendants and which notepaper contained the name of the defendants, the said Bodenham informed the plaintiffs that the cheque for 2000*l.* was being negotiated and requested them to send another cheque for 3000*l.* in place of the cheque already returned to them and to address the cheque to him at the defendants' said office in Oxford Street. Relying upon the representations and facts aforesaid the plaintiffs on the 1st January, 1920, wrote to the defendants that the cheque for 2000*l.* would not be met and enclosed a cheque for 5000*l.* made payable to the defendants in place of the said two cheques for 2000*l.* and 3000*l.* respectively. On the 2nd January, 1920, the defendants

wrote to the plaintiffs acknowledging the receipt of the letter enclosing the cheque for 5000*l.* and stating that they were handing their official receipt to the said Bodenham."

It appears to me that we have to deal with the 5000*l.* cheque only, and with the transaction as it took place on December 31, January 1 and January 2. I think that the 5000*l.* cheque must be treated as having been accepted in place of the two previous cheques.

Bodenham in the meantime had been carrying on a fraud with Messrs. R. E. Jones & Co. It was a remarkable fraud, and it indicates that Messrs. R. E. Jones & Co. were undoubtedly credulous beyond a point one would have attributed to them, and perhaps beguiled by Bodenham, who may have appeared to be an honest man, they without caution entered into a most extraordinary transaction with him. He had represented to them that he was the agent for a motor car firm and was selling motor cars called "Roma" motor cars. He said that he was empowered to entrust them, the plaintiffs, with an agency for the sale of those motor cars—he said they were American motor cars—for the whole of the South and West of England and South Wales, and there actually was an agreement entered into between himself and Messrs. R. E. Jones & Co., Ld., under which agreement Messrs. R. E. Jones & Co., Ld., were to have the selling rights of these "Roma" cars in a considerable number of counties. One of the terms of their getting the agency was that they should purchase 500 motor cars. Now, although no motor cars were shown to them, and although no "Roma" motor car had appeared in any motor car trials, in which, apparently, all good motor cars ought to appear, Messrs. R. E. Jones & Co. seemed to be satisfied—and so pleased were they with the arrangement, that they agreed to pay a deposit of 10*l.* each on the motor cars—on motor cars to be received at some future period. Now, 10*l.* each on 500 motor cars comes to 5000*l.*, and that is the sum which Messrs. R. E. Jones & Co. agreed to pay as a deposit for the cars. There was one point, however, which Messrs. Jones seemed a little uncertain about. They asked

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Bodenham who he was, and he told them he was connected with International Motors. The agreement Messrs. Jones entered into in respect of these cars was made between "International Motors of Premier House, W.C., in the County of London, hereinafter called 'the Company' of the one part, and R. E. Jones, Ld. (Motor Department), Mackworth Hotel, Swansea, hereinafter called 'the dealer' of the other part." Now "International Motors" are not to be found, although there is in existence a limited company with a name very similar. I daresay Bodenham was clever enough to rely upon there being some confusion—and Messrs. Jones were not too careful in regard to matters of precision. Then Bodenham was asked by Mr. Jones, "Who is behind you?" and Bodenham made a statement in which he said that one of the directors of Messrs. Waring & Gillow was taking an interest in the matter, and he indicated to Mr. Jones that there were some people of note in the commercial world who were behind International Motors. But, so far as I can gather from the facts as presented to us, the statements Bodenham made to Mr. Jones were of a very vague character. However, they served their purpose, and Messrs. R. E. Jones & Co. agreed to pay this 5000*l*. The only precaution which they took was this. Bodenham said that Messrs. Waring & Gillow were behind International Motors, and he said, "You can pay the money to Messrs. Waring & Gillow, Ld., who will hold the money; that will be some safeguard to you." Messrs. Jones & Co. took absolutely no trouble to get any information from Messrs. Waring & Gillow. They made no inquiries at all but drew the cheques in favour of Messrs. Waring & Gillow —two cheques signed by one director and not signed by the secretary. Those cheques were drawn by Messrs. Jones in such haste that they had not time to make them out in the ordinary way, and they placed those two cheques in the hands of Bodenham. Then those two cheques were exchanged, as I have already said, for one cheque for 5000*l*.—and the communications took place between Messrs. Jones & Co. and Messrs. Waring & Gillow to which I have already referred.

When one looks at the matter it is quite clear, I think, that if at any moment Messrs. Jones had made any inquiries of Messrs. Waring & Gillow about Bodenham or the motor cars, the whole thing would have been revealed to them. But they did not make any inquiry. They acted in a way which is rather unusual in real life, in a way that is only seen on the stage, when one party refuses to look in the direction in which the whole plot is to be revealed. However, that is the story.

In the Court below this case was tried in a curious way. Mr. Eustace Hills, when the case was before Lord Darling, made his statement in opening, and his statement was accepted as a statement of the facts—together with the correspondence, pleadings, and so on. I think it is important for us to see what was the position of Bodenham. It was contended by Mr. Eustace Hills that Bodenham was in some way the agent of Messrs. Waring & Gillow. Of course, he may untruthfully have represented himself as the agent of Messrs. Waring & Gillow, Ld., but it appears that in truth and in fact, whatever else he was or could be, he could not have been the agent of Messrs. Waring & Gillow, Ld. The plaintiffs in para. 1 of their statement of claim say: "On or about the 23rd December, 1919, one E. F. Bodenham represented to Stanley Bassett Jones, the managing director of, and acting on behalf of, the plaintiff company, that he was the agent of a firm manufacturing motor cars which firm was called 'International Motors,' and of which firm the real principals were the defendant company, and requested that the plaintiff company should become the agents of 'International Motors' in South Wales and the South and West of England," and so on. So that, according to the plaintiffs' story, the representation made was that Bodenham was the agent of a firm called International Motors. He also said that the defendant company were in some way behind him. He did not represent himself in fact to be anything but the agent of International Motors—although he may have pretended there were other persons behind that non-existing firm, as it is now known to be.

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When the case was tried before Lord Darling, Mr. Eustace Hills, in opening the case, said this, as appears from the shorthand notes: "Of course, as your Lordship sees, if the matter had stood between Mr. Stanley Jones and Bodenham, undoubtedly he would have wanted the very strongest guarantees, but as this representation was made by Bodenham that Messrs. Waring & Gillow were behind the matter, that they were financing it and were the principals, and as Mr. Stanley Jones made the cheque payable to Messrs. Waring & Gillow, he was protecting himself in that way," and so he was if what was represented by Bodenham was anything like the truth. Then Mr. Eustace Hills said: "Then everything seemed to be all right. He gave these cheques" —that is, Mr. Stanley Jones did—"to Bodenham to take to the defendants, Bodenham representing himself to be acting as the agent of the defendants. I am not suggesting he was in fact, because it turned out that Bodenham was a fraud and a liar, but Mr. Jones gave the cheques to Bodenham for him to take them to the defendants." That is the story as put by Mr. Eustace Hills in the Court below—that Mr. Jones gave the cheques to Bodenham for the purpose of Bodenham taking them to Messrs. Waring & Gillow. They were taken and used, however, by Bodenham for his own purposes. They were taken by Messrs. Waring & Gillow alio intuitu without the least knowledge at all of the fraud which Bodenham had been perpetrating upon Messrs. Jones. Now, the question arises as to whether or not Messrs. Jones are entitled to get their 5000*l.* back which was paid to Messrs. Waring & Gillow when Messrs. Jones' cheque was cashed in January, 1920.

One further observation falls to be made, and it is this. The writ in this case was issued on March 26, 1920—but the case did not come to trial until December, 1924. We are told that the life of the action was maintained by a series of notices of reviver, which kept it on foot until December of last year.

The claim made by the plaintiffs is put in three ways, the first being: "By reason of the premises the plaintiffs claim from the defendants the sum of 5000*l.* as money had and

received by the defendants to the use of the plaintiffs." The second claim, as an alternative, is "as money paid as and for a consideration that has failed." The third is "or alternatively, as money paid under a mistake of fact." Then, there is a further alternative claim which has not been relied upon or argued, and that is "that the defendants were guilty of negligence whereby the plaintiffs have suffered damage." Apparently that point was not pressed in the Court below and it has not been pressed here, and, therefore, I need not waste any time in regard to it.

We have to examine the question as to whether the plaintiffs can establish their rights under one or other of those three heads. I think myself that the plaintiffs were probably wise in putting their case on the first ground, that ground being "money had and received by the defendants to the use of the plaintiffs." The reason they plead that is this. They sought to make use of one of the old money counts. That is the wide and flexible form of action which used to be brought in the old days when pleadings were more technical than they are now. That type of action gives perhaps as wide a scope as any form of action would to the plaintiffs. We have, therefore, to consider whether or not the defendants, when they received this 5000*l.*, did receive it to the use of the plaintiffs. The difficulty that presents itself at once here is this. At the time when the defendants cashed the plaintiffs' cheque for 5000*l.*, they, according to their interpretation of the facts, held the plaintiffs' cheque and cashed it for and on account of Bodenham; and they made their position perfectly plain, abundantly plain, to the plaintiffs by the letter which they wrote and which I have referred to, the letter in which they say they accepted the money as money paid on behalf of Bodenham, and that they would send their formal receipt to Bodenham. When the plaintiffs seek to recover that money as money had and received by the defendants to the use of the plaintiffs, there is, to my mind, a break in the chain of causation, which would have justified their recovery of the money on that ground. The defendants in fact got this 5000*l.* because they were placed in possession of a negotiable

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instrument, a cheque, which was paid to them by the plaintiffs when that cheque was presented through the defendants' bankers to the plaintiffs' bankers. I think Mr. Jowitt is right when he says that at the time when the cheque for 5000*l.* was presented, it was presented by the bankers on behalf of a holder for value. There is one more fact to which I ought to refer—namely, after this 5000*l.* cheque had been cashed, or, at all events, after the official receipt had been sent on January 5, the vans were sent off and the furniture was handed over to Bodenham again. When the defendants got the cheque and when it was cashed, the position was this. Sect. 27, sub-s. 2, of the Bills of Exchange Act, 1882, says: "Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time." I do not think that means what Mr. Eustace Hills suggested it might mean—namely, value given between the parties, the drawer or acceptor or indorsers of the bill, because being a negotiable instrument if it has been taken and value has been given for it, then against those persons who, at the time when the value was given, were parties to the bill, and who were responsible, the holder is deemed to be a holder for value. They received that bill under a contract with a third party—namely, Bodenham. It is said that because the cheque was drawn in favour of Messrs. Waring & Gillow, Ld., it was a direct transaction between Messrs. Jones & Co. and Messrs. Waring & Gillow, Ld. I do not think that is the effect of the transaction. It was drawn in their favour, but the true transaction which it was intended to represent was a transaction between Messrs. Jones & Co. and Bodenham, and not a transaction with Messrs. Waring & Gillow, because the intention was, at the highest, to make Messrs. Waring & Gillow depositories of the money, and no more. It seems to me, therefore, that the case of *Watson* v. *Russell* (1) and the observations contained in it and in the case of *Symonds* v. *Atkinson* (2) apply, and that those are illustrations which justify one in holding that the plaintiffs cannot establish as

(1) 3 B. & S. 34. (2) (1856) 1 H. & N. 146.

against the defendants, in cases like the present, that money which has found its way into the defendants' pockets was ever had and received by them to the plaintiffs' use. Now, it is said, because Mr. Eustace Hills, of course, felt the pressure and difficulty of what I have called the causation between the parties, that Bodenham was the agent to pay it, and that he was in fact at the time when he received it receiving it on behalf of Messrs. Waring & Gillow, and that by virtue of the agency of Bodenham there was a direct transaction between Messrs. Waring & Gillow and the plaintiffs. I do not think that is true. It certainly is not true on the facts as stated. The representations that were made by Bodenham were all a tissue of lies, but I think it is plain that the purpose for which Bodenham was entrusted with the cheques was in order that he might be the means of transit between the plaintiffs on the one hand and the defendants on the other, to whom the plaintiffs desired that these cheques should be handed over, and I cannot attach to Bodenham the quality or the attributes of a person acting as agent for and on behalf of Waring & Gillow so as to attribute to them responsibility for what has occurred. It seems to me, therefore, that this main ground of claim fails, because there was no such agency of Bodenham as would make Messrs. Waring & Gillow responsible, and upon the facts that I have stated, this money was not money had or received by the defendants to the plaintiffs' use; it was received by them for and on account of Bodenham, Bodenham being the person who had these cheques placed in his hands, cheques which he misused for a purpose of which Messrs. Waring & Gillow had no knowledge.

The next alternative ground upon which the claim is put is that it was money paid on a consideration which has failed. The short answer to that is that there was never any contract, there was never any consideration, which passed between the plaintiffs and the defendants. There was no direct payment by the plaintiffs to Messrs. Waring & Gillow in respect of any contract between them, and there was no consideration moving from them which subsequently failed. There is no relation here which brings into play

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those decisions which show that where money has been paid upon a consideration and where that consideration has failed, the plaintiff may recover the money back. If it is suggested that the intermediary, Bodenham, was a man who could induce a contract between Messrs. Waring & Gillow and the plaintiffs, then, again, what I have said about Bodenham as an intermediary applies. I do not think that his conduct affects the defendants so as to show that there was any direct relation between the plaintiffs and the defendants, or that the plaintiffs can establish their right as against the defendants upon a consideration which has failed.

The third ground is that the money was paid under a mistake of fact. Upon that, much time and learning have been spent, and Mr. Eustace Hills has argued the case with great force, saying that there was a mistake here, a mistake which enables Messrs. Jones & Co. to recall the money which ought not to have remained in the hands of Messrs. Waring & Gillow, because Messrs. Jones & Co. paid the money over upon a mistake. Now, I ask upon the facts, what mistake? It was not a mistake made by Messrs. Waring & Gillow or on a representation made by them. The real mistake which was made was that they, the plaintiffs, mistook Bodenham and believed that Bodenham was an honest man, when he was a rogue. I think one must look at the statement of the law by Parke B. with some care. What he says in the case of *Kelly* v. *Solari* (1) is this: "I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back."

Now, it is to be observed that Parke B. says that it must be paid upon the supposition that a specific fact is true which would entitle the other to the money, but upon which, if untrue, the money would not have been paid. I think there is a confusion upon the facts. The money would not have

(1) 9 M. & W. 54, 58.

been paid by Messrs. Jones if they had known what a rogue Bodenham was. I think that was the dominant fact which led to the money being paid at all. There was an ancillary fact that they were going to put the money into the hands, or hoped to put the money into the hands, of Messrs. Waring & Gillow, Ld., as depositories and for safe keeping. But the reason that the cheques were drawn at all was because of the statement of facts made by Bodenham, all of which facts were untrue as between the plaintiffs and Bodenham. It is really a misuse of the term "mistake of fact" to say that the mistake here was a mistake which enabled Messrs. Waring & Gillow to get the money. The mistake was due to the misapprehension of the plaintiffs, who placed these cheques in the possession of Bodenham.

Now, upon that, one ought also to cite the case of *Aiken* v. *Short* (1), where Bramwell B. says: "In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money." It appears to me that if you take the standard as to mistake of fact from those two decisions and you bear in mind what the facts were here, there was not a mistake of fact which induced the payment of the money. The real fact inducing the payment of the money was, as I have said, the fraudulent representations and story told by Bodenham to the plaintiffs. I think that the point I am making is illustrated by the case of *Chambers* v. *Miller* (2), where a cheque was cashed at a bank and the money was put upon the counter and the payee of the cheque was, in fact, picking it up, but it turned out that the customer's account was overdrawn, and if the bankers had noticed that the customer's account had been overdrawn at the time, they would not have handed the coins to the payee, but the Court said in that case that the payee was entitled to keep the money, and said: "It is true that there was a mistake in cashing the cheque at all, but that was not a mistake as between the

(1) 1 H. & N. 210, 215.

(2) 32 L. J. (C. P.) 30, 32.

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plaintiff and the defendants, but as between the defendants and their customer." Here, too, I repeat that the mistake was a mistake as between the plaintiffs and Bodenham, and not a mistake as between Messrs. Waring & Gillow and the plaintiffs. The plaintiffs and the defendants were each of them under misapprehension—different misapprehensions—and different mistakes of fact. It appears to me, therefore, that it is not possible for the plaintiffs to recover the money as having been paid under a mistake of fact.

I will just add a word upon the case to which Mr. Eustace Hills referred again this morning of *Baker* v. *Courage & Co.* (1), because I think that Hamilton J. confirms what I have said. He says: "The question whether money can be recovered as having been paid under a mistake of fact depends upon the state of mind of the plaintiff at the time when the money was paid, just as in an action of deceit the liability of the defendant depends upon the untruth of the representation having been present to his mind at the time that the representation was made." If you pay attention to the state of mind of the plaintiffs, their dominant state of mind was that they wished to engage in this transaction which Bodenham had represented to them—they wished, with almost undue haste, to be quite sure by paying this money that they obtained this agency, and the purpose for which they paid the money into Bodenham's hands was in order to secure the agency, and that is where the mistake of fact took place. There was in the mind of the plaintiffs, it is true, a subsidiary point as to the position held by Bodenham or the safety which their money would secure in Messrs. Waring & Gillow's hands. But that was not the mistake of fact which led to their handing over the cheque.

I also think that the test which was suggested by my brother, Scrutton L.J., in *Holt* v. *Markham* (2), may be referred to. He says: "There is something to be said for the view that payment under a mistake of fact is not payment at all, and is therefore capable of rectification in cases in which the defendant receives the money under a

(1) [1910] 1 K. B. 56, 64. (2) [1923] 1 K. B. 504, 514.

mistake of fact or has done something to contribute to the plaintiff's mistake of fact, but that the position is otherwise where the defendant is under no mistake of fact and has done nothing to contribute to the plaintiff's mistake." It appears to me if you apply that test, which may be a useful, if not a final, test, here upon the facts, you find that the mistake which is now being attributed to the defendants was a mistake on the part of the plaintiffs in regard to Bodenham.

It is clear from the case of *Townsend* v. *Crowdy* (1) that where there has been a mistake of fact but a waiver of all inquiry, the plaintiff cannot recover. Exactly what is meant by a waiver of all inquiry is not quite clear, and there have been, I think, no very recent illustrations to be found in the books: but in this case, having regard to the conduct of Messrs. Jones and to the extraordinary manner in which they entrusted Bodenham with these cheques, I should be slow to say that they could recover even if I were wrong on the other three points, because I think that there has been such a complete absence of inquiry on the part of the plaintiffs, that it may well be that even if there was a mistake which would justify their recovering in the first instance, they would be disqualified by reason of the manner in which they had placed Bodenham in a position to commit a fraud upon the defendants. However, upon the three grounds I have mentioned, I have come to the conclusion that the plaintiffs fail to make out their cause of action. The plaintiffs, therefore, are not entitled to recover this money from Messrs. Waring & Gillow, and the appeal must be allowed and judgment must be entered for the defendants, with costs here and below.

SCRUTTON L.J. This is a very odd case. I have listened very carefully to the arguments addressed to us by counsel, which, so far as I am concerned, have assisted me in coming to a conclusion. As I have arrived at the same result as the Master of the Rolls, I need not go through in detail all the facts which he stated when giving his judgment; I will

(1) (1860) 8 C. B. (N. S.) 477.

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merely summarize them in order to explain the way in which I look at the case.

Messrs. R. E. Jones & Co., Ld., brought an action against Messrs. Waring & Gillow to recover the sum of 5000*l.* said to have been paid them by mistake of fact, the action being one for money had and received. What Messrs. Waring & Gillow said was this: "We are furniture dealers and we supplied furniture to a Mr. Bodenham, who lives near Birmingham, to the value of nearly 10,000*l.* As we had not been paid anything in respect of that furniture, we began to be anxious and began to press for our money, and Bodenham gave us a cheque which was dishonoured—and when we re-presented it, it was dishonoured again. We then became very anxious about our money, and as Bodenham had entered into a hire-purchase agreement with us, we seized some of the goods we had supplied him with, put them into vans, and took them as far as the railway station. Then Mr. Bodenham came to us with cheques for 5000*l.*, not cheques of his own but cheques of Messrs. R. E. Jones & Co., which he tendered to us in payment of the sum which he undoubtedly owed us in respect of the furniture we supplied to him. Those cheques were peculiar cheques because they were only signed by one director of the company, although there were spaces on them for another director's name and for the secretary of the company's signature. In addition to that, one of them was post-dated. We then took what was our obvious course, and we communicated direct with Messrs. R. E. Jones and asked them whether the cheques we had received, made out in the odd way that they were, were all right. Then Bodenham wrote to them from our premises and on our paper asking them to put the cheques in order. In response to that letter we got direct from Messrs. R. E. Jones & Co. a cheque for 5000*l.* duly signed. Thereupon we wrote to Messrs. Jones on the 2nd January: 'We have to acknowledge receipt of your letter of the 1st inst., enclosing cheque for 5000*l.* on behalf of Mr. F. E. Bodenham, of Birmingham. We are accordingly handing Mr. Bodenham our official receipt for the money paid on his behalf,' and so

on. After getting that letter we supplied Bodenham with more goods to the value of 3000*l.*, and the goods we had taken back under the hire-purchase agreement we returned to him. It was not until a fortnight after that that Messrs. Jones said that they had paid the 5000*l.* to us under a mistake. Messrs. Jones, in paying the money, may have been acting under a mistake, but there was no mistake so far as we were concerned. We supplied Bodenham with furniture and he owed us money, and Messrs. Jones gave him cheques which he brought to us to pay for the furniture which we had supplied him with. The cheques that Bodenham brought us were defective cheques, and then Messrs. Jones sent us another cheque, a cheque for 5000*l.*, and got the two other cheques, the cheque for 2000*l.* and the cheque for 3000*l.*, back again. But the 5000*l.* cheque was still a cheque sent to us through Bodenham, and it was sent to us because of Bodenham's relations, whatever they were, with us." Putting it quite shortly, Messrs. Waring & Gillow say: "There was no mistake so far as we were concerned."

Now, the other side of the case is this—this is Messrs. Jones' side of it. Messrs. Jones say: "Bodenham came to us and he said he was the agent for a company selling 'Roma' motor cars, a company called International Motors, and that Messrs. Waring & Gillow were behind that company." He used various phrases in regard to the matter. It is not exactly clear from what he said what connection he implied Messrs. Waring & Gillow had with International Motors. It is not quite clear whether he meant that there were persons connected with Messrs. Waring & Gillow who were promoting International Motors or whether they were financing the company. But Messrs. Jones say: "Bodenham made a contract with us nominally on behalf of International Motors under which we were to become agents in the South of England and Wales for 'Roma' motor cars. We arranged to take a certain number of 'Roma' cars and to begin the contract by depositing 10*l.* each on the cars; and as we were going to take 500 cars, we wrote out cheques for 5000*l.* and gave them to Bodenham. We thought that there was such a firm as

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International Motors and there were cars known as 'Roma' cars. It was by pure fraud on the part of Bodenham that he got the 5000*l.* out of us, and we say we paid that money under a mistake of fact, and you, Messrs. Waring & Gillow, got it. You, therefore, ought to repay that 5000*l.* to us."

I cannot help thinking, though it is easy to be wise after the event, that it would have been better if the evidence had been proved instead of it being given in the form of a statement by Mr. Eustace Hills. When Mr. Eustace Hills made his opening statement before Lord Darling he did not know that that statement was going to be taken as the evidence in the case. The learned judge in the Court below adopted a somewhat summary way of disposing of the case—supporting himself on a quotation from Romeo and Juliet. He said that there was one legal factor which disposed of the case at once—namely, that there was no consideration, meaning, I suppose, that Messrs. Jones, Ld., obtained no consideration from Messrs. Waring & Gillow for the 5000*l.* which Messrs. Waring & Gillow received from them. Lord Darling said that that settled the case. With great deference to the learned judge, it is not the fact that if there is no consideration you can recover back money which you have paid. If you give a man 1000*l.* there is no consideration, but you could not get it back from him because there was no consideration. The words "failure of consideration" imply that there was an existing legal liability to pay, because you are to get a consideration for your payment, and that if the consideration that you were to get for your payment fails, then you can recover your money back. But that does not apply to a case where there was no legal relationship between the plaintiff and the defendant. The line which the learned judge below took in regard to "no consideration," which he put in the forefront and treated as very short and conclusive, seems to me, with great respect to him, to have nothing to do with the case.

Then we come to the much more difficult branch of the case, as to whether there was such a mistake of fact here on the part of anybody, or on the part of persons who are relevant

to a mistake of fact, that the money can be recovered under an action for money had and received, as it has been explained in the cases which have been decided.

When I gave my judgment in the case of *Holt* v. *Markham* (1) I began by saying that that was a very difficult instance of a difficult branch of the law, and I repeat now the remark I made then. This is a difficult instance of the same branch of the law. The law on the matter is very intricate and it is impossible to decide this case by basing oneself on a passage of Lord Mansfield's, which has been repeatedly commented upon and which is now no longer a satisfactory guide, and by taking one passage from a case in which the particular question under consideration was not considered at all. One may have cases where the plaintiff pays money direct to the defendant, and in such a case as that you may have statements of principle made by the learned judges considering that case, and it will not help you at all to apply statements of principle made in a case where the plaintiff pays money directly to the defendant to cases where the defendant does not receive the money from the plaintiff, but receives it from somebody else with whom he has a valid contract. For a long time that has been a recognized branch of the law of money had and received, with authorities appropriate to it. In the third edition of Bullen and Leake on Pleadings, I find this at p. 47: "Where money of the plaintiff has been wrongfully paid by a third party to the defendant, it may sometimes be recovered under this count, as where the wife of the plaintiff deposited her husband's money with a banker to the account of another, the plaintiff was held entitled to recover it from the banker in this count: *Calland* v. *Loyd.* (2) But where the defendant has received the plaintiffs' money from a third party bona fide and under a binding contract, he is not accountable for it to the plaintiff: *Atlee* v. *Backhouse* (3); *Symonds* v. *Atkinson* (4); *Foster* v. *Green* (5)," and it is that class of case we have to consider here. It is of

(1) [1923] 1 K. B. 504.
(2) (1840) 6 M. & W. 26.
(3) (1838) 3 M. & W. 633.
(4) 1 H. & N. 146.
(5) (1862) 7 H. & N. 881.

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very little use to cite general propositions in cases where that class of mistake was not considered, where the Court was not referred to the cases I have mentioned, and where, therefore, the Court had not those cases in its mind. The duty of the Court here is to consider that class of case and see what the effect is when the defendant has received money from the plaintiff through a third party with whom the defendant has a contract for good consideration and where the defendant has received the money honestly thinking that it relates to the contract which he, the defendant, has with the third party from whom he receives it. The learned judge below decided this case on this head, as I think, on the authority of a proposition of Bramwell B., which he thought was to be found in the case of *Kelly* v. *Solari* (1), but which is, in fact, to be found in the report of another case; and I do not know whether he, having made a mistake as to the name of the case, looked at the facts in the case he cited, in which the money was held not recoverable, but, as a matter of fact, Bramwell B. had considered this very point in the curious case of *Foster* v. *Green* (2), which illustrates very well the difficulties that arise. In *Foster* v. *Green* (2) there was a curious set of facts, but they were very similar to the facts in this case. In that case there was an illiterate person, who had lent some money to a bank cashier; it was a private loan to the bank cashier and not to the bank itself, and the illiterate person wanted the bank cashier to repay him the money he lent him. The illiterate person, therefore, went to the bank cashier and asked him for the money, 40*l.*, which he, the bank cashier, owed him. The bank cashier said "Certainly. Will you just sign a receipt, and I will give you your 40*l.*" The illiterate person, who could not read, signed the document, which was put before him, which he was told was a receipt, but it turned out to be a cheque on the bank for 40*l.* The cashier then handed the illiterate person 40*l.* out of the bank's funds, the illiterate person thinking he was receiving it in repayment of the loan which he had in fact made to the cashier. When the bank found

(1) 9 M. & W. 54. (2) 7 H. & N. 881.

out what had been done, they sued the illiterate person for money had and received by mistake, and it was held that they were not entitled to it, because they had put a person, the bank cashier, in a position in which he was able to hand over their money to the illiterate person, and the illiterate person receiving it for a good consideration and under a valid contract was entitled to say, "Whatever mistake you have committed, I, the defendant, did not receive this money under any mistake; I received it for a good consideration and under a valid contract and I can keep it," and so Bramwell B. held. Perhaps if the learned judge below had extended his researches into what Bramwell B. said in *Foster* v. *Green* (1) he might have come to a different conclusion in this case.

Parke B., whose observations are cited in *Kelly* v. *Solari* (2), said the same thing in the case of *Atlee* v. *Backhouse*. (3) You must have a valid contract between the defendant and the third party, and there are cases in which an action of this sort has succeeded because there was not such a valid contract. In *Calland* v. *Loyd* (4) a man had some money and his wife took it and paid it into a bank on behalf of her infant son. The man sued the bank for money had and received, and the bank replied, "We received this money under a contract," to which the answer was made, "How can you have a contract with an infant, you did not receive it under any valid contract from the third person because there could not have been a contract made on behalf of the infant." Therefore, the bank was liable.

We quite lately decided a similar case to this of *Banque Belge pour l'Etranger* v. *Hambrouck*. (5) In that case a lady had paid some money obtained by forgery into a bank, and there was no doubt that the lady had got the money she paid into the bank under an illegal contract, and it was held that the plaintiffs were entitled to the declaration and order asked for against the defendant Hambrouck. The law in regard to money had and received appears to be this, that

(1) 7 H. & N. 881.
(2) 9 M. & W. 54.
(3) 3 M. & W. 633.
(4) 6 M. & W. 26.
(5) [1921] 1 K. B. 321.

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where the defendant has no legal relationship with the plaintiff but receives money which has in fact come from the plaintiff bona fide and for valuable consideration from a third party with whom he has a legal relationship, he can keep the money so obtained from the plaintiff under a mistake of fact if he, the defendant, was not a party to that mistake and did not contribute to it. It appears to me that the facts here are the same as in a case where an agent with a secret limitation acts in excess of that limitation and the person with whom he acts, who is ignorant of the secret limitation, is not bound by the secret limitation and can treat him as having the authority which he professes to have. In this case Messrs. Jones put it in Bodenham's power to hand over this cheque to Messrs. Waring & Gillow—a cheque made out payable to Messrs. Waring & Gillow. Of course, Messrs. Jones meant Bodenham to say to Messrs. Waring & Gillow, "This cheque is in respect of a deposit on motor cars and you must only hold it as a deposit on motor cars." But Bodenham did not make that reservation in regard to the cheque, and it seems to me that the loss consequent upon Bodenham's fraud must fall upon Messrs. Jones, the people who entrusted Bodenham with the cheque, and not upon the people who, having a valid contract with Bodenham, took the money from Bodenham in payment for the furniture which they had supplied him with.

For these reasons, which are not referred to in the judgment given by Lord Darling, but which appear to me to be reasons applicable to this case, I think that the plaintiffs must fail and that the defendants are entitled to succeed.

I do not propose to decide in this case what would have happened if the mistake had been found out before the cheque was cashed and an action had been brought by Messrs. Waring & Gillow as payees against Messrs. Jones as drawers. It must not, however, be taken from that that I think that such an action as that would have failed. I think that the passage which has been read from the case of *Watson* v. *Russell* (1) shows that it probably would have

(1) 3 B. & S. 34.

succeeded. It is true that in the case of *Watson* v. *Russell* (1) the cheque was not marked "not negotiable," whilst in this case it was marked "not negotiable." As at present advised, I do not think as between drawer and payee that the marking of the cheque "not negotiable" affects a right of action on the cheque at all. But, as I say, I am not deciding that, because in this case the cheque was paid and the foundation for the action, if any, is "money had and received" as money received under a mistake of fact. Confining myself to that branch of the law and rejecting the reason given by the learned judge below for coming to the conclusion which he did, that there was no consideration, I think that this appeal should be allowed, with the result indicated by the Master of the Rolls.

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SARGANT L.J. I am of the same opinion, and in view of the exhaustive judgments which have been delivered by the Master of the Rolls and Scrutton L.J., I will confine my remarks within quite a narrow compass. It seems to me that there is one question of fact which is of very great importance in this case, and that is the question, not whether Bodenham was in fact the agent of Messrs. Waring & Gillow—everybody knows he was not—but whether Bodenham represented himself to the plaintiffs, Messrs. R. E. Jones & Co., as being the agent of Messrs. Waring & Gillow—because that may affect very definitely the capacity in which the cheques were handed to Bodenham to hand to Messrs. Waring & Gillow.

Now unfortunately the facts have to be dealt with on the basis of the pleadings and one document, and also and mainly on a quasi admission made by the defendants that the opening speech of Mr. Eustace Hills in the Court below was accurate in all respects. But nevertheless I have come to a perfectly clear conclusion that we must take it that there never was a representation made by Bodenham at all to Messrs. Jones that he was the agent of Messrs. Waring & Gillow.

The allegation in para. 1 of the statement of claim is this: "On or about the 23rd December, 1919, one E. F. Bodenham

(1) 3 B. & S. 34.

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represented to Stanley Bassett Jones the managing director of and acting on behalf of the plaintiff company that he was the agent of a firm manufacturing motor cars which firm was called 'International Motors' "—so far so good—" and of which firm the real principals were the defendant company." What that means I really do not know. It may mean, I should think it probably does mean, that the persons really financially interested in International Motors were the defendant company. But that is a long, long way from saying that the persons who financed the company were the principals of Bodenham, the agent of the financed company.

Now let us look at the agreement; and here we are on very firm ground indeed. The agreement under which Messrs. Jones agreed to pay a deposit on these cars was signed on behalf of them, the plaintiffs, by Mr. Stanley B. Jones, the managing director of the company, and it was also signed by Bodenham in this way, "Accepted for International Motors, E. F. Bodenham." If it had been intended that Bodenham should act as the agent of Messrs. Waring & Gillow, who were the real persons, so it was said, who were negotiating with Messrs. Jones in this motor car business, Bodenham, of course, would not have signed the agreement on behalf of International Motors, but he would have signed it on behalf of Messrs. Waring & Gillow.

Now when one comes to look at the opening statement of Mr. Eustace Hills in the Court below, one finds this in the transcript of the shorthand notes: "Mr. Bodenham said that the firm International Motors"—whether there was such a firm or not nobody appears to know accurately—" which he said he represented "—so he was representing himself as the agent of that firm—" was just on the point of being floated into a company, and Mr. Sutton therefore asked him who the directors of the company were going to be, and Mr. Bodenham said that the people who were financing the thing, and who were the principals behind him in the matter, were the defendants, Messrs. Waring & Gillow, the well-known Oxford Street firm." Then later I see that Mr. Eustace Hills said this: "As it was clear that Mr. Stanley Jones was not satisfied to

trust Mr. Bodenham, whom he did not know, Bodenham then said again that the firm was being financed by Messrs. Waring & Gillow, the defendants, but he said that Sir Samuel Waring did not want this to be known until after the flotation of the company." To say that Messrs. Waring & Gillow or the directors of Messrs. Waring & Gillow were interested in the promotion of, or were financing, or were the real persons behind, International Motors is certainly not only not an assertion that they were the principals, but seems to me to be inconsistent with the view that they were the principals of the agent in that transaction. One remembers very well, going back a long way now, one or two of the great cases where big banks came to grief through having over-advanced—I am thinking particularly now of the case of the West of England Bank and the way in which they advanced money to some persons named Booker, who were big iron producers—money to such an extent that the banks ultimately failed: but nobody would say that because a bank or a financial firm chose to finance or lend money to another firm or company, that bank or those financiers so making advances became the principals of the firm to which they were advancing money, so that they were directly liable on the contracts made by the firm or company so financed, and still less that they were in the position of principals so as to be the principals of the agent of the financed firm. To my mind it is quite clear that the position which this scoundrel Bodenham took up towards the plaintiffs was this: "I am the agent of International Motors, and that company has the advantage of the financial assistance of Messrs. Waring & Gillow, Ld."

That then being so, what was the capacity in which Bodenham took these cheques for the purpose of their being handed over in the first instance to Messrs. Waring & Gillow? It seems to me that Messrs. Jones & Co., who had been thoroughly taken in by the statements of this plausible rogue Bodenham, intended that he should take the money to Messrs. Waring & Gillow for the purpose of its being put at the disposal of Messrs. Waring & Gillow on account of the motor car business, and they trusted that he would inform

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Messrs. Waring & Gillow that the money they were paying was to be used by them as and by way of a deposit in accordance with the terms of the arrangement come to between themselves, the plaintiffs, and Bodenham on behalf of International Motors. The plaintiffs intended that the money should go into the hands of Messrs. Waring & Gillow, as it did in fact ultimately, and that then it should be used for Bodenham purposes, but for the Bodenham purposes as set out in the agreement entered into between International Motors and themselves, the plaintiffs. The mistake that the plaintiffs made was this. They made no direct communication with Messrs. Waring & Gillow at all, but they allowed Bodenham to take this money and they trusted that he (Bodenham) would explain to Messrs. Waring & Gillow the limitation of the authority under which he was acting. In fact their confidence was entirely misplaced. Bodenham being put in possession of this money, instead of telling Messrs. Waring & Gillow that it was money to be used only for the special purposes for which it was given to him, took advantage of his position and used it for his own purposes in order to discharge a private debt of his own to Messrs. Waring & Gillow.

It seems to me that in those circumstances there can be no effective claim on the part of the plaintiffs to recover this money. In my judgment, not only does the case of *Foster* v. *Green* (1), which Scrutton L.J. has referred to, apply, but really the case comes exactly within the principle of *Watson* v. *Russell* (2), to which Mr. Jowitt referred at the beginning of his argument. There the plaintiff had caused a sum of money to be handed to the defendant through an agent, but he only caused it to be paid on a particular condition which he expected would be communicated to the defendant: the intermediary, however, never communicated that condition at all to the defendant. In that case it was held that nevertheless the plaintiff was not entitled to recover. The way the matter is put in *Watson* v. *Russell* (2) is this:

(1) 7 H. & N. 881. (2) 3 B. & S. 34, 38.

"If A. by means of a false pretence or a promise or condition which he does not fulfil, procures B. to give him a note or cheque or acceptance in favour of C., to whom he pays it, and who receives it bona fide for value, B. remains liable on his acceptance." Now changing those letters into the names in the present case, what we have here is this. We have a case where Bodenham, by means of false pretences or promises, procures the plaintiffs, Messrs. Jones, to give a cheque in favour of the defendants, Messrs. Waring & Gillow, and he pays it to Messrs. Waring & Gillow, and Messrs. Waring & Gillow receive it bona fide for value, and apply it in payment of Bodenham's debt. In my judgment the result follows that the plaintiffs are not entitled to recover the money from the persons to whom it was perfectly rightly transferred, although it was transferred without the further information being given as to the purposes for which it was to be used.

It seems to me that in this case the intermediary Bodenham was not the agent, and did not represent himself to be the agent, of Messrs. Waring & Gillow's at all. And he used the money for an apparently proper purpose, namely, for the purpose of paying off a debt which he owed to Messrs. Waring & Gillow. I should have thought that any ordinary cautious person would not have relied upon representations, such as the representations made by Bodenham, without communicating with the people to whom the money was to be paid. Messrs. Jones, the plaintiffs, knew very little, if anything at all, about Bodenham.

I should just like to add this, although it is not the main ground upon which I think that this appeal should be allowed. In all these cases where the question is which of two innocent parties is to suffer, one cannot leave out of consideration the question which of the two innocent parties really has been guilty of carelessness or negligence or want of ordinary care. Looking at the matter from that point of view, it is to my mind quite clear that the carelessness and neglect which really caused the loss to the plaintiffs in this case were their own, because they, the plaintiffs, chose to pay this money on the

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representations made to them by Bodenham without having any sort of direct communication with the defendants, Messrs. Waring & Gillow. And further, I cannot myself see that the defendants in this case have been guilty of any want of ordinary business care at all. I agree, therefore, that this appeal should be allowed.

Appeal allowed.

Solicitors for appellants: *Finch, Jennings & Tree.*

Solicitors for respondents: *T. D. Jones & Co., for Edward Harris, Swansea.*

R. M.

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[IN THE COURT OF APPEAL.]

BUERGER *v.* CUNARD STEAMSHIP COMPANY.

[1924. B. 1894.]

Ship—Bill of Lading—Exceptions protecting Shipowners—Alteration of Destination by Agreement—Subsequent Deviation from Contract Terms and Contract Voyage—Loss of Goods—Liability of Shipowners.

The plaintiff shipped eight bales of cloth, each of the value of 360*l.*, for carriage by the defendants from London to Odessa by their steamship *Verentia*, under a bill of lading which excepted liability on the part of the defendants for goods above the value of 20*l.* per package, unless the value was therein declared and extra freight paid, and such exception was to apply from the inception to the determination of the defendants' liability in connection with the goods. The plaintiff did not declare the value of the goods or pay extra freight. The contemplated voyage of the ship was to Constantinople and thence to Black Sea ports, including Odessa. While on the voyage to Constantinople it appeared that Odessa was likely to be captured forthwith by the Soviet forces, so rendering it impossible for the ship to call there. At Constantinople it was agreed between the respective agents of the plaintiff and defendants that the destination of five of the bales should be changed from Odessa to Batoum, and that the remaining three bales should be discharged at Constantinople either then or on the ship's return voyage. They were not then discharged, and the ship proceeded on her route to Constanza, then across the Black Sea to Batoum and back via Poti and Novorossisks to Constantinople. The three bales were landed at Novorossisks, and the other five were not delivered at Batoum, but there was no evidence where they were landed. Eventually all eight

bales were lost. In an action by the plaintiff for non-delivery of the goods:—

Held, that although the terms of the original bill of lading applied to the carriage to the substituted destinations, yet that in the circumstances the defendants were not entitled to rely upon the contract terms, for in respect of both the five and the three bales they had departed from the contract terms and the contract voyage.

Decision of Rowlatt J. reversed.

APPEAL from a decision of Rowlatt J. This was an action by the plaintiffs as shippers of goods against the defendants as shipowners for non-delivery of goods shipped on the defendants' steamer *Verentia* for carriage to Odessa.

Under a bill of lading dated March 24, 1919, the plaintiff shipped on board the *Verentia*, then lying in the port of London and bound for Odessa, eight bales of cloth for carriage to Odessa. Each bale weighed about a quarter of a ton, and was of the value of 360*l.* at least. The bill of lading was in the form of the defendants' Mediterranean outward bill of lading, and one of the conditions provided that the defendants were not to be accountable for any goods which were above the value of 20*l.* per package, unless the value were therein expressed and extra freight, as might be agreed, paid. The exceptions and conditions were introduced by a clause providing that "those exceptions shall apply from the inception to the termination of the company's liability in connection with the goods." The value of the bales was not expressed in the bill of lading and no extra freight was paid.

The contemplated voyage of the *Verentia* was from London to Constantinople, Constanza, Batoum, Novorossisks, Odessa, and thence again to Constanza and Constantinople. Before the ship reached Constantinople the parties became aware that Odessa was about to be captured by the Soviet forces, and consequently she could not proceed to Odessa. It was verbally agreed, after the arrival of the ship at Constantinople, between one Macdonald on behalf of the plaintiff and a member of the firm (Messrs. Seager & Co.) who acted as the defendants' agents at Constantinople, that the defendants should discharge and deliver three of

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the bales at Constantinople, and carry the remaining five bales to Batoum and deliver them there; but if the three bales could not be found in time for discharge at Constantinople, as they had some 300 tons of goods loaded on top of them, then they were to be discharged on the ship's return to Constantinople. The plaintiff paid to the defendants 25*l.* for landing charges at Constantinople in respect of the three bales. The three bales were not found, and the ship sailed from Constantinople on May 17 and proceeded on her route, to Constanza, then across the Black Sea to Batoum, and back via Poti and Novorossisks to Constantinople. The three bales were discharged at Novorossisks between June 26 and July 4, but they were never forwarded to Constantinople, and presumably fell into the hands of the Soviet forces. The five bales were not delivered at Batoum, and the probability was that they were carried on to Novorossisks. Ultimately all the eight bales were lost, and the plaintiff commenced this action.

The action was tried before Rowlatt J., who held that all the eight bales were carried on their amended voyage on the terms of the bill of lading, and that the condition as to the expression of value and payment of extra freight was effective to discharge the defendants from liability; and his Lordship dismissed the action, except so far as he ordered the repayment of the landing charges at Constantinople to be repaid to the plaintiff.

The plaintiff appealed. The appeal was heard on March 30, 31, and April 1, 29, 1925.

R. A. Wright K.C. and *van den Berg* for the appellant. There was in this case such a deviation as avoided the original contract contained in the bill of lading, and the defendants have not discharged the onus of proving that the terms of the bill of lading applied to the substituted agreement.

The defendants cannot prove affirmatively how the goods were lost. There was no necessity to land any of the goods at Novorossisks. It is not suggested that there was any

blockade, or strike, or interdict. The clauses indorsed on the bill of lading with reference to war are not material. The ship never suspended or abandoned her voyage, but went on the whole time.

The onus is on the plaintiff to prove there was a deviation. It is clear from the evidence that the five bales were not discharged at Batoum and that the three bales were landed at Novorossisks. There was a deviation, and when once there is deviation the original contract is discharged ab initio.

The claim is made on two new contracts, and it is for the defendants to show that those contracts were subject to all the provisions of the original contract. The Court is not bound to draw that inference, and there is nothing to show that they were subject to the conditions of the original contract.

The law as to abrogation of special contracts is well settled. A condition or exception ceases to operate as soon as the carrier ceases to do that which he has contracted to do: *Lilley* v. *Doubleday* (1); per Scrutton L.J. in *Neilson* v. *London and North Western Ry. Co.* (2) Here the exception as to liability in the case of no declaration of value being made applies only so long as the original contract continues. This is a different case from *Gibaud* v. *Great Eastern Ry. Co.* (3), in which the defendants, although negligent, were protected, because what they did was not outside their contract. The defendants in this case abrogated their special contract.

Deviation displaces an express contract: *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (4), and renders the defendants liable for the full obligations of common carriers: *Internationale Guano en Superphosphaat-Werken* v. *Robert Macandrew & Co.* (5)

There was no misconveyance of the goods. When they were dispersed at Novorossisks the agreed transit was

(1) (1881) 7 Q. B. D. 510.
(2) [1922] 1 K. B. 192, 201.
(3) [1921] 2 K. B. 426, 429, 434.
(4) [1907] 1 K. B. 660, 667, 669.
(5) [1909] 2 K. B. 360.

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departed from and the protection accorded to the carrier during transit ceased; *London and North Western Ry. Co.* v. *Neilson* (1); *The Cap Palos.* (2)

There was no special contract in this case, and if there was it was departed from by landing the goods at wrong places.

Jowitt K.C. and *J. Dickinson* for the respondents. The evidence shows that the protection given by the bill of lading was always in force, and that it was never intended to carry the goods to other ports under the liability of common carriers. The new arrangement decided upon at Constantinople for the delivery of some of the bales at Batoum and of others at Constantinople merely varied the destination, but subject to the original terms, and did not constitute a fresh contract. So long as the goods were on board no one had authority to waive the original contract and agree to carry the goods as a common carrier divorced from the bill of lading. There was a change of destination to Batoum, and nothing else. The doctrine of deviation does not apply. The respondents are entitled to the protection of the bill of lading: *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (3). Cases of negligence or misdelivery, such as this is, stand on a different footing from cases where the breach of contract is so fundamental (such as deviation, defects in seaworthiness, or substitution of one ship for another) as to make the original provisions of the contract wholly inapplicable, as illustrated by *The Cap Palos.* (4) The three bales were delivered short of their destination, and it is doubtful whether the five bales were carried beyond their destination. Delivery at a port short of destination when the ship continues and finishes her voyage is not deviation, but misdelivery through negligence: *Smackman* v. *General Steam Navigation Co.* (5); *Bruce Marriott & Co.* v. *Houlder Line.* (6) After the three cases last mentioned there has never been a case in which it has been held to be

(1) [1922] 2 A. C. 263.
(2) [1921] P. 458.
(3) [1908] 2 K. B. 626.
(4) [1921] P. 458, 470.
(5) (1908) 13 Com. Cas. 196.
(6) [1917] 1 K. B. 72.

deviation where an agreed ship has throughout kept to an agreed voyage, but has put out goods at an intermediate port.

The terms of this bill of lading are much wider than in *Keymer* v. *Cunard Steamship Co.* (1) and in *Sargant & Sons* v. *East Asiatic Co.* (2), which was not followed in *Broken Hill Proprietary Co.* v. *Peninsular and Oriental Steam Navigation Co.* (3)

What happened to the five bales is a matter of surmise. There is not enough material for the Court to draw any inference that the five bales were discharged at one port more than another, and as regards them there is no evidence of deviation at all. It is guesswork to say that the five cases were discharged post Batoum. If they were discharged at or before Batoum there is no room for the doctrine of deviation. These bales may have been discharged at or before the proper port, then if the goods were in the possession of the shipowners they would, no doubt, be under an obligation to send on the goods to the required place, but no claim is made against the defendants for not sending on the goods. If on the other hand there is ground for saying that the bales were discharged post Batoum, then with regard to the three bales there was no deviation, and with regard to the five bales the fair inference that the Court ought to draw is that when they reached Batoum these bales were not found for delivery, and therefore the shipowner had the right to carry them on subject to the duty to send them to their destination, and then the over-carriage would not be a deviation. Whether the goods were found for delivery or not it cannot be said that an over-carriage is a deviation so as to abrogate the provisions of the bill of lading.

Wright K.C. replied upon the cases cited on behalf of the respondents and also referred to *Atlantic Shipping and Trading Co.* v. *Louis Dreyfus & Co.* (4)

Cur. adv. vult.

(1) (1915) 20 Ll. L. Rep. 12.
(2) (1915) 21 Com. Cas. 344.
(3) [1917] 1 K. B. 688.
(4) [1922] 2 A. C. 250.

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April 29. POLLOCK M.R. Under a bill of lading dated March 24, 1919, the plaintiff shipped on board the defendants' steamship *Verentia*, then lying in the port of London, and bound for Odessa, eight bales of cloth to be carried to and delivered at Odessa to the plaintiff or his assigns. Each of the bales was of the value of 360*l.* or rather more.

The vessel was unable to proceed to Odessa owing to political disturbances, and so, as the plaintiff alleges, it was verbally agreed after the arrival of the steamship *Verentia* at Constantinople, between one Macdonald on behalf of the plaintiff and a member of the firm who acted as the defendants' agents at Constantinople, that the defendants should discharge and deliver three of the bales at Constantinople, and carry the remaining five bales to Batoum and deliver them there. As part of this agreement, the plaintiff paid 25*l.* to the defendants as and for landing charges in respect of the three bales which were to be landed at Constantinople, and 17*l.* 15*s.* extra for the freight on the five bales to be carried on to Batoum.

The defendants have failed to deliver any of the eight bales, or to account for them to the plaintiff, and the plaintiff in this action seeks to recover their value as damages from the defendants for breach of their contract of carriage on the basis of their liability being that of common carriers.

The defendants deny that their liability was that of common carriers, and rely upon the protection given by the bill of lading, which they claim attached at all times to the carriage of the bales. The defendants in particular rely upon an exception therein as follows: "nor for any goods of whatever description which are above the value of 20*l.* per package unless the value be herein expressed and extra freight as may be agreed, paid"; and on the clause introducing the exceptions and conditions which runs: "and those exceptions shall apply from the inception to the termination of the company's liability in connection with the goods."

The intended voyage of the steamship *Verentia* from London was to have been as follows: Constantinople,

Constanza, Batoum, Novorossisks, Odessa, thence again to Constanza and Constantinople. It appears from the facts stated in the "Points of Claim" that while the vessel was at Constantinople on her outward voyage, when it was realized that a call at Odessa was impossible, an agreement was reached whereby the destination of five of the bales was changed from Odessa to Batoum, and from the evidence that as the bales were found to be covered by some 300 tons of other cargo, making it very inconvenient to reach them, the remaining three bales, which by this new agreement were to be discharged at Constantinople, should be carried on the round voyage and unloaded on the vessel's return there, homeward bound.

Rowlatt J., before whom the case was tried, has found that as regards the five bales, their transit to Batoum was to be "on the same terms as they were to be carried to Odessa simply substituting Batoum for Odessa." I agree that this inference is correct.

As regards the three bales which were to be discharged at Constantinople he finds that they are to be treated "just as if they were still on board the ship lying at Constantinople."

I have some difficulty in accepting this view. No doubt the shipowner could object to discharging them at Constantinople, except on terms to which he agreed; but if the goods were to be carried on a complete voyage round the Black Sea, the plaintiff might well ask for different conditions from the shipowner. But whether this point is decided one way or the other does not make any difference to my decision.

Rowlatt J. held that all the eight bales were carried on their amended voyages on the terms of the bill of lading, and that the exception that I have referred to was effective to discharge the defendants from liability, for it is common ground that the plaintiff did not express the value or pay extra freight, so as to release him from its effect. Rowlatt J., therefore, dismissed the action except in so far as he ordered the repayment of the 25*l.* for landing charges at Constantinople to be repaid to the plaintiff. The plaintiff appeals. The

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learned judge did not give effect to the point which has been the main ground of appeal before this Court—namely, that by reason of what is broadly called "deviation," the exceptions in the bill of lading ceased to have effect.

It is important to state the facts as to the fate of the eight bales. As to the three that were destined for Constantinople, there is definite information given on August 31, in answer to inquiries by the defendants' agents in July, that these bales were discharged at Novorossisks when the steamship *Verentia* called there, as she did from June 26—July 4, and "will be forwarded to you by next steamship." They were thus discharged at an unexpected port, and were kept in the defendants' custody for a month or so at Novorossisks. As to the other five bales the evidence is not so clear. It may be definitely stated that they were not delivered at Batoum, and the probability is that they also were carried on to Novorossisks. The evidence satisfies me that in respect of all the eight bales the terms of the bill of lading were abrogated by the deviation from the voyage intended by the new agreement. Mr. Jowitt has contended for the defendants that there was not a deviation, but a misdelivery; and that if Rowlatt J.'s view that the bill of lading still applied to the new transit of the goods as agreed is right, there is nothing to prevent the exception having effect, for there was not a deviation which abrogated the terms of the contract of carriage—only a different mode of carrying out that contract. It is necessary therefore to examine some of the authorities cited on either side to determine the quality of the adventures that befell the goods. It is well to start with the proposition, simply stated for the Court by Grove J. in *Lilley* v. *Doubleday* (1), which followed *Davis* v. *Garrett* (2), that "If a bailee elects to deal with the property entrusted to him in a way not authorised by the bailor, he takes upon himself the risks of so doing, except where the risk is independent of his acts and inherent in the property itself."

The principle thus enunciated has been again and again

(1) 7 Q. B. D. 511. (2) (1830) 6 Bing. 716.

applied to cases of carriage both by sea and land. To take some of the more recent instances. In *Balian & Sons* v. *Joly, Victoria & Co.* (1) an exception as to a limit of value was held not to protect the shipowner from liability for damage to bales of tobacco carried to London, not on the vessel—though apparently on a better one—and not by the route, contemplated by the bill of lading. That case was followed in *Joseph Thorley, Ld.* v. *Orchis Steamship Co.* (2), where the vessel in the course of her voyage called at three additional intermediate ports. Collins M.R. said (3): "The principle underlying those judgments seems to be that the undertaking not to deviate has the effect of a condition, or a warranty in the sense in which the word is used in speaking of the warranty of seaworthiness, and, if that condition is not complied with, the failure to comply with it displaces the contract. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowner to put the contract in suit." *Internationale Guano en Superphosphaat-Werken* v. *Robert Macandrew & Co.* (4) offers a good illustration of both limbs of the proposition stated by Grove J. to which I have referred. The vessel deviated by calling at Seville after leaving her first port of discharge, Algeciras, and before she reached her second, Alicante. It was held that the deviation put an end to the contract as from the beginning of the voyage, and that the shipowners could not rely upon the exceptions in the bill of lading, and were under the obligations of common carriers—as to the damage caused by the delay. But inasmuch as some of the damage was due to the nature of the cargo and not to failure to carry the goods with reasonable despatch, they were not responsible for the former.

Scrutton L.J. has recently in *Neilson* v. *London and North Western Ry. Co.* (5) stated the law as follows: "I decide this case on two broad principles of great importance in

(1) (1890) 6 Times L. R. 345.
(2) [1907] 1 K. B. 660.
(3) [1907] 1 K. B. 667.
(4) [1909] 2 K. B. 360.
(5) [1922] 1 K. B. 192, 201.

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all these contracts of carriage, first, that when a carrier seeks to protect himself by exceptions, unless they are so worded as to indicate clearly a contrary intention, they only apply where the excepted events happen in the course of his carrying out the contract, and do not apply where they happen while he is doing something which he has not contracted to do." The second principle was that the shipowner must protect himself by clear and unambiguous language. It is not questioned that shipowners—if not common carriers—are subject to similar liabilities. It is true that in some cases apparent breaches of the contract of carriage have been held not to be such as to go to the root of and displace the contract—to use the words of Lord Collins quoted above. Thus in the *Broken Hill Proprietary Co.* v. *Peninsular and Oriental Steam Navigation Co.* (1), an exception which permitted the defendants to over-carry goods beyond their port of destination still applied, although the vessel reached the latter port, but did not wait there long enough to discharge the goods, because as a mail steamer she was under contract and penalties as to time. In effect it was held that the contract of carriage must be regarded as made subject to the vessel's duties and disabilities as a mail steamer and was not displaced by the vessel's inability arising from that character to deliver the goods. So, too, in *Bruce Marriott & Co.* v. *Houlder Line* (2), a general ship known to have to call for her cargo at successive ports and to load and discharge accordingly, must not be held to have abrogated the contract or failed to fulfil a condition precedent to it, if she temporarily puts out some cargo on to the quay at a port of call, in order to stow that and fresh cargo better. Swinfen Eady L.J. said that "both parties must be presumed to have contracted with reference to the known, usual, well-established, and even necessary course of business."

Stress was laid by Mr. Jowitt on the case of *Baxter's Leather Co.* v. *Royal Mail Steam Packet Co.* (3), but that

(1) [1917] 1 K. B. 688.
(2) Ibid. 72, 80–1.
(3) [1908] 1 K. B. 796; [1908] 2 K. B. 626.

case does not assist the defendants. There is in it (1) a clear statement by counsel, adopted in the Court of Appeal, that a shipowner in the absence of special contract incurs the same liability as a common carrier. As the President said, the question in the case was one of construction. Prima facie the shipowners were liable for the loss of goods shipped, which they failed to deliver at their destination. There was a clear exception in the bill of lading limiting their liability either wholly, in the case of certain goods, or partially, in the case of others. One source of liability was negligence. It was held, upon the construction of the bill of lading, that the limitation of liability applied and extended to cases where a loss arose through negligence.

The present facts do not constitute a misdelivery to a wrong or unauthorized person, as in *Smackman* v. *General Steam Navigation Co.* (2), where fruit was delivered through the fault of agents to the wrong persons, and it was held that the shipowners were protected by an exception designed to meet that case. There is no evidence that the eight bales were ever out of the custody and possession of the defendants. There is evidence that some of them were overcarried on a voyage never contemplated, and detained by the defendants themselves at the port where they were improperly discharged.

It is useful to look at one or two cases in which the facts have been held to establish "deviation." They afford illustrations and tests as to what is in effect a deviation from the route contracted for, upon which, if followed, the conditions of the contract apply. In *Mallet* v. *Great Eastern Ry. Co.* (3) some fish were to be sent from Lowestoft to Jersey. The route selected by the plaintiff was through London, and thence by the steamer from Weymouth. In fact, by mistake, it was sent by steamer from Southampton. There was delay and consequent loss. The defendants relied upon a condition of the contract of carriage relieving them from all liability for delay, except upon proof that

(1) [1908] 2 K. B. 626, 631. (2) 13 Com. Cas. 196.
(3) [1899] 1 Q. B. 309, 311.

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such delay arose from wilful misconduct on the part of the defendants' servants. Day J. in giving judgment said: "The defendants entered into a contract with the plaintiff to send his goods to Weymouth. Without his consent they altered the contract and sent the goods by a different route. . . . . The defendants contend that they are protected from liability for that delay by the terms of the consignment note. But I am of opinion that that is not so. The delay referred to in the consignment note is a delay in the performance of the contract. But that is not this case. Here the delay arose in consequence of the defendants doing something which was wholly at variance with the contract." The defendants were held liable. In *Foster* v. *Great Western Ry. Co.* (1) the railway company were protected by a clause relieving from all liability for delay, except upon proof of wilful misconduct on the part of the company's servants. Some fish was overcarried to Taunton beyond Exeter where it ought to have been transferred to a truck for carriage to Southampton en route for its destination to Jersey. It was sent from Taunton to Weymouth and so to Jersey—admittedly the best alternative route. The Divisional Court, on appeal from the county court, held that the clause applied, and protected the railway company. They found a distinction from the decision in *Mallet* v. *Great Eastern Ry. Co.* (2) These two cases came up for consideration in *Neilson* v. *London and North Western Ry. Co.* (3) In that case some goods were delivered to the defendants to be carried from Llandudno to Bolton by the ordinary route through Chester and Manchester. At Manchester, owing to the address label having been detached from the truck in which they were, the goods were separated. Some were sent to stations indicated by old labels upon them, some were stored in the cloak room and forwarded later, with consequent delay in delivery. The defendants sought to protect themselves by a condition similar to those already cited in *Mallet's* (2) and *Foster's* (1) cases. The railway company were held liable, because the condition did

(1) [1904] 2 K. B. 306. (2) [1899] 1 Q. B. 309.
(3) [1922] 1 K. B. 192, 204.

not apply to the journey on which the goods were in fact sent. Atkin L.J. said this: "These exceptions do not apply unless the goods are being carried on the journey stipulated for," and spoke of the principle as applicable "to contracts of carriage by sea, by river, by land, contracts of marine insurance, and contracts of bailment." *Foster* v. *Great Western Ry. Co.* (1) was overruled. In the House of Lords (2) that decision was upheld. *Mallet* v. *Great Eastern Ry. Co.* (3) was held to apply, and it was agreed that *Foster* v. *Great Western Ry. Co.* (1) should be overruled. Lord Dunedin, agreeing with Scrutton L.J. as to the broad principle, says (4): "In all contracts of carriage, when a carrier protects himself by exceptions, unless they are very clearly worded, they only apply to his carrying out of the contract, and do not apply if he is doing something which he has not contracted to do. There is a familiar example of that rule in the cases which have held that an exception in a bill of lading is unavailing as against a loss due to causes falling within the words of the exception, but incurred in the course of a deviated voyage."

The principle, therefore, of *Davis* v. *Garrett* (5) and *Lilley* v. *Doubleday* (6) has thus received constant approval, and the cases cited illustrate what our decision ought to be in the present case, where the contract, with the destination for some bales altered, and as to the three, with the port for their discharge changed, has not been carried out, but the goods carried and in part discharged elsewhere. "As the accident occurred at the time and place when it did, the ship being then on her deviating course, the shipowner is responsible unless he can show that the loss or damage would have occurred if she had been on her proper course": see per Phillimore L.J. in *James Morrison & Co.* v. *Shaw, Savill and Albion Co.* (7); and per Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (8) This onus the shipowner cannot discharge, and the defendants remain unprotected by the exception and liable for the loss of the goods.

(1) [1904] 2. K. B. 306.
(2) [1922] 2 A. C. 263.
(3) [1899] 1 Q. B. 309.
(4) [1922] 2 A. C. 272.
(5) 6 Bing. 716.
(6) 7 Q. B. D. 510.
(7) [1916] 2 K. B. 783, 800.
(8) [1921] 2 K. B. 426, 435.

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The appeal must be allowed with costs here and below, and judgment must be entered for the plaintiff for the sum agreed between the parties, and 17*l.* 15*s.* in addition to the 25*l.* awarded to the plaintiff below.

ATKIN L.J. This is a claim by shippers of goods against shipowners for non-delivery of goods shipped on the defendants' steamer for carriage to Odessa. The defendants rely upon exceptions and conditions in their bill of lading. The plaintiffs reply, first, that at the time of loss the goods were not being carried on the terms of the bill of lading; and secondly, that the loss occurred while the defendants were dealing with the goods otherwise than in accordance with the contract of carriage, and the contract exceptions do not apply.

The facts are that in March, 1919, the plaintiffs shipped on board the defendants' steamship *Verentia* in London eight cases of woollen cloth for carriage to Odessa. Each case weighed about a quarter of a ton, and apparently measured about 28 cubic feet. The goods were shipped on the terms of the Cunard Company's Mediterranean outward bill of lading. This is a remarkable document. It contains, in addition to thirteen lines of exceptions, 31½ square inches of conditions printed in the smallest type I have ever seen in any commercial document—I think it is named "diamond" —which appear to absolve the company from any liability in respect of the goods which they are contracting to carry. A question appears to have been raised at the trial as to whether the plaintiff was bound by this document: but the judge rightly ruled that he was bound, and no such question was raised before us. It is sufficient to say that for shippers to the Mediterranean by the Cunard Company it appears to be advisable to have good eyesight, and to use it. One of the conditions provided that the company was not to be accountable for any goods which were above the value of 20*l.* per package, unless the value was therein expressed and extra freight as might be agreed upon paid. These packages were above the value of 20*l.*, but their value was not expressed

in the bill of lading, nor does it appear that extra freight was paid. The defendants, therefore, by the contract were not accountable for the goods. I think this means, not that the defendants had not contracted to carry them, but that they were not to be liable for damages for breach of the contract of carriage. The contemplated voyage of the *Verentia* was to Constantinople and thence to Black Sea ports. What the originally contemplated itinerary was we do not know. Before the ship reached Constantinople the parties became aware that the Soviet forces were approaching Odessa, and the defendants, on April 10, informed the plaintiffs that it had been arranged that the steamer would discharge her Odessa cargo at Novorossisks. It is plain that the plaintiffs, in the circumstances, would have no desire to have their goods discharged at Odessa. It is unnecessary to consider how far the defendants were justified in choosing a substituted port for them, for on arrival at Constantinople the necessary alterations in the contract of carriage were agreed between the plaintiffs' representative, Mr. Macdonald, and the defendants' Constantinople agents, Messrs. Seager & Co. The ship's agents gave the plaintiffs the option of having their goods discharged at Constantinople, Novorossisks or Batoum. Eventually it was agreed between the plaintiffs and the defendants that three specified cases should be discharged at Constantinople, where Mr. Macdonald had found a purchaser for them, and the remaining five should be carried to Batoum and discharged there. If, however, the three cases could not be found in time for discharge in Constantinople before the ship sailed for Black Sea ports—and the agents reported that there were probably 300 tons of goods on top of them—then they were to be discharged on the ship's return to Constantinople. They were not found, and the ship thereupon sailed from Constantinople on May 17 to complete her voyage and return to Constantinople. When she sailed it is known that she had the three cases on board, for they were afterwards discharged at Novorossisks, and I think that the true inference is that the other five cases were also on board. In ordinary practice the eight cases would be

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stored together, and it is unlikely that the five cases not wanted would be found and discharged by mistake while the three were not found. The ship proceeded on her route to Constanza, then across the Black Sea to Batoum, and back via Poti and Novorossisks to Constantinople.

At this stage it will be convenient to dispose of the question whether the ship was still in possession of the goods on the terms of the bill of lading. It was contended that as the contract voyage, London to Odessa, had been abandoned, and the bill of lading surrendered at Constantinople in exchange for delivery orders, a new contract of affreightment had been entered into, and there was no evidence of any special terms. In any case, it was said in respect of the three cases the ship was only in a position of a travelling warehouse until she got back to Constantinople, and she was carrying them about the Black Sea for her and not for the plaintiff's convenience. I think, however, that Rowlatt J. came to the right conclusion in holding that what took place amounted to a variation of the original contract of carriage, and the ship continued to carry the goods on the same terms as before, save as varied as to port of destination, division of cases, and altered freight.

The ship duly arrived at Batoum, where she stayed from May 23 to June 13. For part of the time Mr. Macdonald was present. It appears to me clear from the ship's documents that the goods were never discharged at Batoum. Mr. Macdonald at one time expressed the very confident opinion that all the cases were stolen at Batoum. He did not know then that three were afterwards discharged at Novorossisks, and in view of the size of the packages and the practical impossibility of pilfering from the ship without leaving some trace of the cases, I think, in the absence of any evidence by the ship to contradict the contemporaneous documents, the true inference is that the five cases being in the ship were not discharged at Batoum, but with the three were conveyed in the ship beyond Batoum. What afterwards happened to the five is unknown. The fate of the three is not quite so obscure. The veil lifts for a time, but then finally closes.

The ship arrived at Novorossisks on June 26, leaving on July 4. During that time it is known that the three were discharged there. On August 31 the ship's agents at that port, writing to Messrs. Seager & Co. at Constantinople, say: "In reply to yours of the 23rd July, I beg to inform you that the undermentioned goods"—identifying the three cases—"ex *Verentia* were discharged at Novorossisks and will be forwarded to you by next steamship." The letter of July 23 seems to have been an inquiry as to the three only. It then appears that from about July 4, at latest, to August 31, the three cases were at Novorossisks under the control of the defendants' agents, and on August 31 were awaiting re-shipment to Constantinople. They were wrongly discharged at Novorossisks; nothing in the bill of lading contract authorized it. They were never sent on to Constantinople; no evidence was called by the defendants in respect of them. It is supposed that they fell into the hands of the Soviet forces later in the autumn.

In these circumstances it seems to me that the defendants are not entitled to rely upon the contract terms, for in respect of both the five and the three cases they had materially departed from the contract terms and the contract voyage. In the *Cap Palos* (1) I had occasion to refer to the statement of the principle of law as stated by Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (2) The passage cited was adopted by Lord Atkinson and approved by Lord Dunedin in *London and North Western Ry. Co.* v. *Neilson* (3), and I refer to Lord Atkinson's speech: "As soon as the carrier deliberately deviates from the stipulated route he carries the goods where the consignor never agreed that they should be carried, and where he (the carrier) by his special contract never agreed that he would carry them. So far from performing the duty to which the special protective provision applies, he abandons the attempt to perform it—ceases to act in accordance with it, in fact violates it. Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (2) clearly and forcibly states this principle,

(1) [1921] P. 458, 471. (2) [1921] 2 K. B. 426, 435.
(3) [1922] 2 A. C. 263, 273.

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which is not confined to contracts of carriage by a railway company. He said: 'The principle is well known, and perhaps *Lilley* v. *Doubleday* (1) is the best illustration, that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.'" Lord Atkinson explains later (2) what he means by "deliberate": "The diversion, though due to accident or mistake, was deliberate on the part of the company's servants." Here there was a "deliberate deviation from the stipulated route," a breach of the contract "by not doing the thing contracted for in the way contracted for" and "not keeping the article in the place in which you have contracted to keep it," that is, in the case of the three, the ship. It would be difficult, I think, to distinguish the case of the three, wrongly landed and left somewhere at Novorossisks for at least eight weeks, from the six packages in the *Neilson* case, wrongly taken out of the van and taken to the cloak room at Manchester. The five packages, once it is ascertained that they were carried past Batoum, are, for the defendants, past praying for.

In these circumstances I think that the defendants have no answer to the claim for non-delivery of the cases, and that judgment must be entered for the plaintiff, with costs here and below.

SARGANT L.J. Agreeing, as I do, with the result of the judgments that have just been delivered, I will express myself as briefly as possible.

On the two points that are specifically dealt with by Rowlatt J. in his judgment I have come to the same conclusion as he did. I think that the effect of the fresh arrangement

(1) 7 Q. B. D. 510. (2) [1922] 2 A. C. 274.

that was made at Constantinople by Mr. Macdonald, the agent of the plaintiff, was merely to change the destination of the eight cases of cloth in question, and to substitute Batoum for Odessa as to five of the cases, and as to the remaining three cases to substitute Constantinople on the steamer's return voyage in place of Odessa. This being so, I am of opinion that in other respects the terms of the original bill of lading applied to the carriage to the substituted destinations. Further, though the very stringent conditions of the bill of lading are printed in regrettably small type, I do not think that the plaintiff is entitled on this ground to escape from the obligation of these conditions, for his evidence is clear that he assumed that the conditions were ordinary conditions, and that he never took the trouble to read them or attempt to read them. Accordingly, in my judgment, the plaintiff's claim must be dealt with on the footing that the conditions of the bill of lading, including that as to value, applied to the substituted carriage of the goods in question.

But this does not exhaust the matter, for the plaintiff took another important point, which is not specifically mentioned in the learned judge's judgment—namely, that the conditions of the bill of lading applied only to the carriage agreed on, whether as originally arranged or as subsequently modified; and that there was such a deviation from the agreed carriage as swept away the whole of the special conditions and left the defendants subject to liabilities substantially equivalent to those of common carriers. That this is the consequence of a real and substantial deviation is not disputed. The difficulty here is in ascertaining whether there was such a deviation, particularly as there is some uncertainty as to the facts with regard to the five cases which were arranged to be carried to Batoum.

On the whole, however, I have come to the conclusion that these five cases were not landed at Batoum, and were carried on to Novorossisks and landed there, together with the three cases destined for return to Constantinople. The suggestion that these five cases were landed at Batoum and stolen there is purely conjectural. There are letters not

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long after the steamer's departure from Batoum, which distinctly state that the five cases were not landed there; and there is a strong probability that, originally consigned as they were to Odessa together with the other three cases which were undoubtedly landed at Novorossisks, they, in common with the three cases, were involved in the same mistake.

Now, if this is so, or if the five cases, having failed to be landed at Batoum, were in fact landed at Poti, an intermediate port of call between Batoum and Novorossisks, this extra carriage beyond Batoum was, in my judgment, a deviation never contemplated in the modified arrangements between the parties, and therefore not protected by the conditions of the bill of lading. Although the steamer might have taken the ports in any order, and might, had it proved advisable, have called again at Batoum on the way back to Constantinople, it has never been suggested that there was any intention of doing so after Batoum had once been left; and so the carriage beyond Batoum was in fact a carriage quite additional to and outside the carriage agreed on. Hence, as to these five cases, the defendants are outside the protection of the special conditions of the bill of lading, and are liable for the loss that has been sustained.

As to the three cases the matter stands on a somewhat different footing. Down to the time of their arrival at Novorossisks they were being carried on the agreed voyage as modified; and, if they had been temporarily put on shore there with a view to discharging other cargo, and had been damaged or stolen before reshipment, the conditions of the bill of lading would have applied: see *Bruce, Marriott & Co.* v. *Houlder Line*. (1) But they were in fact delivered to, and subsequently held by, the defendants' agents at Novorossisks, as goods reaching their destination; and this is, in my judgment, a deviation from the contract of carriage sufficient to deprive the defendants of the benefit of the conditions or exceptions in their favour,

(1) [1917] 1 K. B. 72.

so far as loss resulted from this unauthorized delivery and retention.

I agree, therefore, that the appeal should be allowed as to all the eight cases of cloth.

Appeal allowed.

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Solicitors for appellant: *Cosmo Cran & Co.*

Solicitors for the respondents: *William A. Crump & Son.*

R. M.

[IN THE COURT OF APPEAL.]

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BRIGGS *v.* THOMAS DRYDEN AND SONS.

TALBOT *v.* VICKERS, LIMITED.

Workmen's Compensation — Accident to Infant Workmen — Incapacity — Recorded Agreement containing Declaration of Liability—Subsequent further Incapacity—Application after attaining Age of Twenty-one for Review and Increase of Compensation—Application made after January 1, 1924*—Accrued Interest—Contrary Intention—Interpretation Act,* 1889 (52 *&* 53 *Vict. c.* 63), *s.* 38, *sub-s.* 2*—Workmen's Compensation Act,* 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., para.* 16, *Proviso—Workmen's Compensation Act,* 1923 (13 *&* 14 *Geo.* 5, *c.* 42), *s.* 24, *sub-s.* 6.

Before the Workmen's Compensation Act, 1923, came into force a workman under the age of twenty-one years met with an accident arising out of and in the course of his employment, and an agreement was recorded by which the employers admitted their liability to pay compensation to the workman under the Workmen's Compensation Act, 1906, during total or partial incapacity. After the commencement of the Workmen's Compensation Act, 1923, the workman, being then over twenty-one years of age, applied for a review and increase of the rate of compensation payable to him under the proviso to Sch. I., para. 16, of the Act of 1906:—

Held, that the workman had an accrued right to a review of the rate of compensation under the proviso to Sch. I., para. 16, of the Act of 1906, and was therefore entitled, by virtue of the Interpretation Act, 1889, s. 38, sub-s. 2, to a review under that proviso even after it had been repealed by s. 31 of the Act of 1923 and a new proviso "substituted" by s. 24, sub-s. 6, of that Act.

Two appeals from the judges of Preston and Barrow-in-Furness County Courts respectively sitting as arbitrators under the Workmen's Compensation Acts, 1906 to 1923.

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The applicant was employed by the respondents as an apprentice turner, and on April 4, 1918, when he was sixteen years of age he met with an accident arising out of and in the course of his employment as the result of which he lost a large part of the first finger of his right hand. He received compensation on the footing of total incapacity at the rate of 12*s.* 6*d.* a week until September 13, 1918, when he returned to work. On November 6, 1918, an agreement between the employers and workman was recorded by which the employers admitted their liability to pay compensation in the event of the applicant being thereafter totally or partially incapacitated or unable to earn such wages as he would probably have been earning at that time in the employment of the employers or in any other employment as a result of his injuries.

The applicant attained twenty-one years of age on December 7, 1923. On September 29, 1924, he had the stump of his finger removed, as he had been suffering pain in it, and was totally incapacitated until January 13, 1925. The employers paid him 17*s.* 6*d.* a week compensation during incapacity, being the compensation to which he was entitled having regard only to his average earnings of 12*s.* 10*d.* a week before the accident.

The workman applied on December 22, 1924, for the review and increase of the weekly compensation and claimed an increase by virtue of the proviso to Sch. I., para. 16, of the Workmen's Compensation Act, 1906, to 35*s.* a week on the ground that but for the accident he would probably have been earning over 2*l.* a week.

This application was resisted on the ground that as from January 1, 1924, when the Workmen's Compensation Act, 1923, came into force, s. 22, sub-s. 6, of that Act had substituted a new proviso for the proviso to Sch. I., para. 16, of the Act of 1906, and that under the new proviso no increase of the compensation payable to a workman in respect of an accident whilst he was a minor could be obtained after he had attained the age of twenty-one years.

The county court judge held that the workman had by virtue of the declaration of liability an accrued right to an increase of compensation under the proviso to Sch. I., para. 16, of the Act of 1906 and that this accrued interest was preserved, notwithstanding the repeal of the proviso, by s. 38, sub-s. 2, of the Interpretation Act, 1889. He therefore made an award at the increased rate of 35*s.* a week for the period of incapacity.

The employers appealed.

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The applicant was employed by the respondents as an apprentice caulker, and on December 10, 1917, when he was seventeen years of age, he met with an accident arising out of and in the course of his employment that resulted in the loss of the sight of one eye. He was totally incapacitated until October 3, 1918, and was paid compensation at the rate of 12*s.* 6*d.* a week. Meanwhile on March 21, 1918, the employers and workman entered into an agreement which was duly recorded under which the employers admitted their liability to pay compensation in the event of the workman being thereafter totally or partially incapacitated from work as a result of his injuries.

On October 3, 1918, the workman, being unfit for his old work by reason of his injuries, was taken on as a sheet iron worker and continued to work regularly until 1922. He was subsequently unemployed during the following periods: May 18, 1922, to October 3, 1922; November 10, 1922, to February 21, 1924; March 18, 1924, to August 7, 1924; October 11, 1924, onwards.

The workman had attained twenty-one years of age on October 21, 1921. On November 19, 1924, he commenced proceedings for a review and increase of his rate of compensation under the proviso to Sch. I., para. 16, of the Workmen's Compensation Act, 1906. His claim was for compensation at the rate of 1*l.* per week on the basis of partial incapacity during the above periods and for the future.

The application was resisted on the same ground as in

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Briggs v. *Thomas Dryden & Sons*, but the county court judge decided in favour of the workman for the same reasons as in that case.

The employers appealed.

There was a further question raised in this case which was the subject of a cross-appeal, but this is dealt with separately. (1)

T. Eastham K.C. and *Harold Derbyshire* for Thomas Dryden & Sons. This case comes within the new proviso substituted by s. 24, sub-s. 6, of the Workmen's Compensation Act, 1923, for the proviso to Sch. I., para. 16, of the Workmen's Compensation Act, 1906. The new provision only enables a workman injured while a minor to obtain an increase of the rate of compensation while he is under the age of twenty-one years, and the workman is not entitled therefore to any increase. The old proviso was repealed by s. 31, sub-s. 5, and Sch. II. of the Act of 1923, and by s. 24, sub-s. 6, the new proviso is "substituted." The county court judge has held that the workman's rights under the old proviso remain, notwithstanding its repeal by virtue of s. 38, sub-s. 2 (*c*), of the Interpretation Act, 1889.

Two points arise under this sub-section: (1.) whether there was "any right, privilege, obligation, or liability acquired, accrued, or incurred" under the repealed proviso, in which case the repeal is not to affect it "unless the contrary intention appears"; and (2.) whether any such contrary intention appears.

The position has already been considered in *Moakes* v. *Blackwell Colliery Co.* (2), where this Court held that there was a vested right in the employers which prevented s. 24, sub-s. 2, of the Act of 1923 from applying. Here, however, the word used in s. 24, sub-s. 6, is that the new proviso is to be "substituted" for the old. This is sufficient to show a contrary intention within s. 38, sub-s. 2, of the Interpretation Act, 1889.

Further there was no accrued right here by reason of the

(1) Post, p. 682. (2) Ante, p. 64.

declaration of liability. No rights accrue until the workman takes some step to vest himself with rights that by virtue of a declaration of liability he is free to acquire. A mere right to take advantage of provisions of a repealed statute is not an accrued right: *Abbott* v. *Minister for Lands.* (1) [*Wingate-Saul K.C.* referred to *Hamilton Gell* v. *White.* (2)] A declaration of right merely keeps open the workman's right to go to the court, if new circumstances arise. To that extent it differs from an award of a nominal sum. No right under it can arise until a loss is suffered by reason of incapacity. Until incapacity there is no right acquired.

Greaves-Lord K.C. and *F. W. Beney* for Vickers, Ld. This case is distinguishable from *Moakes* v. *Blackwell Colliery Co.* (3) Sect. 24, sub-s. 2, of the Act of 1923 was there under consideration, and it related to an additional compensation given by s. 2 of the Act of 1923. Now by s. 30 of the Act of 1923 ss. 2 to 10 of the Act were not to apply to any accident happening before the commencement of the Act. It followed that s. 24, sub-s. 2, also could not apply to an accident before the commencement of the Act. It is true the Court also considered the further point under the Interpretation Act, 1889, but that part of the judgments was not necessary to the decision.

Again the workman had not acquired a right under the old proviso. In *Hamilton Gell* v. *White* (2) a step had been taken showing an intention to follow the code provided for by the repealed section of the Agricultural Holdings Act, 1908. Here the mode of obtaining an increased rate of compensation by way of review was not instituted until after the repeal. No right had accrued before the date of the application for a review: *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (4) Further, the new proviso enacted in s. 24, sub-s. 6, of the Act of 1923 relates to a matter of procedure and on this ground applies retrospectively: *The Ydun.* (5)

Lastly, the provision that the new proviso shall be

(1) [1895] A. C. 425.
(2) [1922] 2 K. B. 422.
(3) Ante, p. 64.
(4) [1914] 2 K. B. 30.
(5) [1899] P. 236, 245.

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"substituted" for the old one means that Sch. I., para. 16, is to be treated as if it had originally been enacted with the new proviso. There is therefore a contrary intention within s. 38, sub-s. 2, of the Interpretation Act, 1889.

Wingate-Saul K.C. and *Beney* for the workman Briggs.

Sir H. Slesser K.C. and *R. S. T. Chorley* for the workman Talbot.

POLLOCK M.R. The case of *Briggs* v. *Thomas Dryden & Sons* is an appeal from the county court judge, who decided in favour of the workman, that his rights were to be considered as arising under para. 16 of Sch. I. of the Workmen's Compensation Act, 1906. [His Lordship then stated the facts.] It is said on behalf of the employers that since the agreement for a declaration of liability was recorded the Workmen's Compensation Act, 1923, has been passed, and that, although up to the date of its coming into force on January 1, 1924, the rights and liabilities of the workman and the employers were governed by Sch. I., para. 16, of the Act of 1906, yet since January 1, 1924, these rights and liabilities are governed by the Act of 1923. Sect. 24 of the Act of 1923 makes certain minor amendments in the principal Act, and in particular it provides in sub-s. 6 that "For the proviso to paragraph 16 of the First Schedule to the principal Act the following proviso shall be substituted." Then follows a new proviso, to which alone, the employers say, regard is to be had.

It is plain that a number of matters, some probably difficult of solution, will arise for consideration in connection with the modifications in the law made by s. 24 of the Act of 1923. Thus sub-s. 3 of s. 24 provides that "Paragraph 1 (*a*) (iii.) of the First Schedule to the principal Act shall have effect as if '15*l*.' were substituted for '10*l*.'" That is an increase in the sum allowed by the earlier Act for a funeral. I have cited that because it seems to suggest a possibility that some of the powers referred to in s. 24 are intended to be engrafted upon the Act of 1906, and to take effect even though the accident may have taken place before the later Act came into force. I want to leave open all such questions under

s. 24 which may hereafter have to come up for decision, but in respect of which it would be premature to express an opinion during the present case.

The question we have to decide is whether in the present case the county court judge was right in holding that he must have regard to para. 16 of Sch. I. of the Act of 1906 in estimating what the workman was entitled to. We have already had a similar question before us in *Moakes* v. *Blackwell Colliery Co.* (1), a case which arose under s. 24, sub-s. 2, of the Act of 1923. In that case it was pointed out by this Court that the Interpretation Act, 1889, s. 38, contains a provision intended to apply to all Acts which modify or repeal previous Acts. Sect. 38, sub-s. 2, provides: "Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not . . . . (*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed." This Court decided in *Moakes* v. *Blackwell Colliery Co.* (1) that s. 24, sub-s. 2, of the Act of 1923 did not show any such contrary intention as would prevent the operation of s. 38, sub-s. 2, of the Interpretation Act, 1889. I think the Court intended to decide that, and that it was an integral part of the decision of the Court. It does not necessarily follow, because that was our opinion in reference to sub-s. 2, that the same reasoning and conclusion must be reached in respect of other sub-sections of s. 24 of the Act of 1923. But I am satisfied that in regard to the present case there is no contrary intention to be found in sub-s. 6. The present case is one where a recorded agreement has been reached between the parties under which the employers admit their liability, subject only to the measure of that liability being quantified under the procedure of the Act; and the Act referred to was the Act of 1906. That being the nature of the agreement it appears clear to me that there was a right acquired or liability accrued or incurred as between the workman and the employers under the Act of 1906; and, that being so, that right or liability

(1) Ante, p. 64.

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continues to be ascertained under that Act by virtue of s. 38 of the Interpretation Act, 1889, notwithstanding the modification introduced by sub-s. 6 of s. 24 of the 1923 Act, unless there is to be found a contrary intention within the meaning of the Interpretation Act, s. 38. I do not think it is sufficient that sub-s. 6 says that the new proviso is to be substituted for the proviso in para. 16 of the First Schedule to the principal Act. There is not sufficient weight in the word "substituted" to indicate a contrary intention.

Although it is not easy to reconcile these two Acts and the Interpretation Act, yet I am glad that the principles laid down by the Interpretation Act can be invoked in the present case, because otherwise a hardship would be caused to the workman, whilst, as the matter stands, the workman's rights are secured and he is able to obtain the decision of the county court judge as to the rate of compensation he ought to receive under the proviso to para. 16 of the Act of 1906.

In my judgment the county court judge rightly interpreted the sections before him and has come to a right conclusion, and the workman is entitled to the sum which the county court judge awarded him.

The second case, which I now have to consider, is *Talbot* v. *Vickers, Ld.* [His Lordship stated the facts.] It is pointed out that the agreement declaring the employers' liability in this case is not verbatim the same as was the agreement in the case that I have just dealt with; but substantially I see no difference between them, because the effect of the agreement here is that the employers admit a liability to pay, and that, as and when it becomes necessary to quantify the sum payable to the workman, that sum is to be ascertained, failing agreement between the parties, by arbitration under the Act of 1906.

What I have already said as to the Interpretation Act and the reading of the two Acts, the Act of 1906, and the Act of 1923, applies to the present case. A difficulty has arisen in respect of which there is a cross-appeal as to the exact amount which the employers are to pay. I do not say anything more upon that point, because it has yet to be

argued. What has been argued and what I give a decision upon now is that, by the decision already referred to of *Moakes* v. *Blackwell Colliery Co.* (1) and the decision I have just given in the previous case, the rights of these parties are to be determined under the proviso to Sch. I., para. 16, of the Act of 1906, and not under what is called the substituted proviso. I will only add this: Mr. Derbyshire called our attention to the well-known case of *Abbott* v. *Minister of Lands.* (2) In that case the judgment of the Privy Council was delivered by Lord Herschell, who pointed out that in a public Act it cannot be said that a member of the public has acquired a right at a time when he has taken no step and given no indication that he in particular is anxious to implement a general right given to all. Another case to which attention was called was *Hamilton Gell* v. *White* (3), a case in which the Court of Appeal held that a tenant who, upon receiving notice to quit, had taken the proper steps to secure compensation under the Agricultural Holdings Act, 1908, from his landlord, was entitled to proceed with the enforcement of that right, in spite of the fact that a later Act modified the rights conferred in such a case. It was held that the case fell within s. 38 of the Interpretation Act, and that the right of the tenant had accrued to him. It is clear from what Bankes L.J. said that a step had been taken by the tenant indicating an intention to put in suit his rights, and therefore that the supervening Act which modified the rights of a tenant in such a case had no application, because the old rights were preserved to the tenant by s. 38, sub-s. 2 (*c*), of the Interpretation Act.

In the present two cases it appears to me plain that the Interpretation Act does preserve the rights of the workmen. The county court judges in both cases came to a right conclusion, and the appeals on this point must be dismissed with costs.

WARRINGTON L.J. In each of these two cases the workman was at the date of the accident an infant under the age of

(1) Ante, p. 64. (2) [1895] A. C. 425. (3) [1922] 2 K. B. 422.

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twenty-one years. The question in each case is whether the workman, who had attained the age of twenty-one years before the coming into operation of the Act of 1923, is by that Act deprived of the right which he previously had under the proviso to para. 16 of the First Schedule to the Act of 1906 to have his compensation reviewed by reference to the amount which he would probably have been earning at the date of the review if he had remained uninjured, a special right given to an infant workman sustaining an injury by accident. In the first case the accident happened on April 4, 1918, and on November 6 in the same year there was recorded an agreement that "in the event of the said Arthur Stanley Briggs hereafter being totally or partially incapacitated for work, or in the event of the said Arthur Stanley Briggs being hereafter unable to earn such wages as he would probably have been earning at that time in the employment of the said Thomas Dryden or any other employment, as the result of such injury, the said Arthur Stanley Briggs shall be entitled to compensation under the Workmen's Compensation Act, 1906, the amount of such compensation to be ascertained, failing agreement, by arbitration under the said Act, which compensation the said Thomas Dryden admits his liability to pay." It seems to me to be quite clear that by virtue of the Act of 1906 and this recorded agreement there had accrued to the workman, at the coming into operation of the Act of 1923, a right to have his compensation upon review fixed by regard to the matters mentioned in the proviso to para. 16 of the First Schedule to the Act of 1906.

By s. 24, sub-s. 6, of the Workmen's Compensation Act, 1923, there is substituted for the proviso to para. 16 of the First Schedule to the old Act a proviso which I need not read in full. The point of it for the purpose of these proceedings is that any review must take place before the workman attains the age of twenty-one years. In each of these two cases the workman attained the age of twenty-one years before the coming into operation of the Act. The result is that, if the new proviso were substituted for the old proviso

in the case of these particular workmen, each of them would lose altogether the right which under the original Act an injured infant workman had of having his compensation reviewed in reference, so far as amount is concerned, to the amount of wages he would probably have been earning at the date of review if the accident had not happened. He would have lost it altogether. Now is that the true result? In my opinion, the Legislature is saved from having attributed to it any such results as that by the Interpretation Act, 1889. By that Act it is provided that "where this Act or any Act passed after the commencement of this Act repeals any other enactment, then, unless a contrary intention appears, the repeal shall not," among other things, "(*c*) affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any Act so repealed." I ought to have said that, besides providing that a new proviso should be substituted for the old proviso, the Act of 1923 in terms repeals the proviso in the Act of 1906. Therefore, there is no question that the very words of the Interpretation Act apply. I have already said that in my opinion the workman had acquired a right to have his compensation fixed in the particular way provided for by the proviso to para. 16. Unless there is some contrary intention expressed in the Act of 1923, the repeal does not affect that right. Now with regard to this point I adopt what was said by the three judges then sitting in this Court in *Moakes* v. *Blackwell Colliery Co.* (1) It is said that the judges in that case expressed their views merely as dicta, and that the point with regard to the Interpretation Act did not really arise for decision. I do not express any opinion as to whether that was so or not. It is enough to say that in this case it does arise for decision, and I adopt the judgments which were delivered in the previous case as my own. In my opinion no contrary intention has been shown. The Interpretation Act, 1889, therefore, applies, and, so far as these cases are concerned, the workman is entitled to the rights which he would have had under the repealed proviso.

(1) Ante, p. 64.

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With regard to the second case, I need not go in detail into the facts. In all material points they are identical with those in the first case. The only difference, if it is a difference, is that in the recorded agreement in the second case all that is said is that, if he becomes totally or partially incapacitated for work as the result of his injuries, the workman shall be entitled to compensation under the provisions of the Workmen's Compensation Act, 1906, "the amount of such compensation to be ascertained, failing agreement between the parties, by arbitration under the said Act." The agreement makes no express reference to the wages which the workman would probably have been earning at the date of the review but for the accident. That seems to me to make no difference. In this case, as in the other, the Act and the agreement together give to the workman an accrued right to have his compensation reviewed under para. 16 of the First Schedule to the Act of 1906. In my opinion, therefore, the appeal in each case fails and must be dismissed.

ATKIN L.J. These two cases arise on somewhat similar circumstances. They are both cases where the appellants were young apprentices aged about seventeen. One was an apprentice turner and the other was an apprentice caulker. They both met with accidents in the course of their employment, and they both made claims for compensation, and had agreements recorded declaring their respective employers' liability to pay compensation. They were, however, both given employment of a different nature by their employers, and the question of reviewing the compensation or claiming an increase in the rate of compensation did not arise in either case until after they had reached the age of twenty-one.

Under the Act of 1906, where a young workman under twenty-one had been injured and had a right to compensation, his weekly payment could be reviewed, and if the review took place more than twelve months after the accident the amount could be increased to any amount not exceeding 50 per cent. of the weekly sum which the workman would

probably have been earning if he had remained uninjured. That, of course, was intended to give effect to the fact that as his years increased so would his wages naturally increase, and to give him a remedy commensurate with the loss which he was at the time suffering. That was altered by the Workmen's Compensation Act, 1923, and there to some extent the rights of the workmen were improved, because there is no limitation of 50 per cent. The substituted proviso is to the effect that if the review takes place more than six months after the accident and before the workman attains the age of twenty-one years, "the amount of the weekly payment may be increased to such an amount as would have been awarded if the workman had at the time of the accident been earning the weekly sum which he would probably have been earning at the date if he had remained uninjured." The substantial effect of that is to remove the minimum of 50 per cent. and also to give the workman a right to review within six months of the accident, but it provides for the first time that the review must take place before the workman attains the age of twenty-one years. Why that was put in I for my part am quite unable to understand. Why a young man should be able at twenty years and ten months to get the increased rate and at the age of twenty-one years and one month not be able to get it, I cannot explain. I can see that it may give great interest to employers and insurance companies to celebrate the coming of age of their young injured workman, but, except for giving them an interest of that kind, the object of the section is not easily discernible.

The question we have to consider is whether these workmen who were in fact injured before the Act of 1923 came into force still retain the old right given them under the Act of 1906, and for that purpose it is necessary to ascertain whether or not a right or privilege accrued to them under the Act of 1906. It appears to me quite plain that it did. I think we are bound by the decision in *Moakes* v. *Blackwell Colliery Co.* (1)

(1) Ante, p. 64.

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That is a stronger case, because there the Court was dealing with an alteration in the law which affected the liability of the employers to pay the dependants of a fatally injured man, and it was held that the liability must be treated as having been incurred when the man was injured on a date before the Act of 1923 came into effect, although in fact he died afterwards. In that case no right, in the sense of a right to receive compensation, accrued to the workman's dependants before 1924; and yet, although he might never in fact have died and might therefore never have had dependants entitled to compensation, it was held that the employers incurred the liability to pay compensation, and presumably the dependants acquired the conditional right to receive it, as soon as the accident happened, even though the man did not die till after the new Act came into force. I have no doubt at all that that case binds us; and, apart from that decision, I should, in this particular case, certainly come to the same conclusion. In this case the workman had a right to compensation that was recognized by an agreement which is equivalent to an agreement to pay a nominal sum per week; the man has claimed his compensation at the right time, and he had an acquired right to compensation for the actual injury that had happened to him, although the actual amount of compensation would vary with the circumstances, and depend upon whether or not incapacity again supervened so as to show that the workman really was suffering from a loss of earning capacity.

This case closely resembles in principle *Hamilton Gell* v. *White*. (1) There the Court was dealing with compensation for disturbance under the Agricultural Holdings Act, 1908. Here it is dealing with compensation for injury under the Workmen's Compensation Act; but the principle is precisely the same. There it was held that where a tenant was disturbed by receiving a notice to quit, and had given notice of a claim to compensation, he had acquired the

(1) [1922] 2 K. B. 422.

right to compensation; and even though he had not in fact gone out of possession before the Agriculture Act, 1920, was passed, so that the arbitration proceedings had not then taken place, yet it was held that there was an acquired right to compensation for disturbance, which he could enforce under the old Act. It appears to me plain that the two young workmen in the cases before us had in fact acquired a right or privilege under the Act of 1906, and they retain it by virtue of the Interpretation Act, unless the contrary appears in the new Act. And I can see no indication of a contrary intention in the new Act.

I agree that *Moakes* v. *Blackwell Colliery Co.* (1) does not necessarily govern the particular sub-section of s. 24 we are considering. That case dealt with s. 24, sub-s. 2, and there were plain indications in another relevant section that sub-s. 2 only related to accidents occurring after the coming into force of the Act of 1923. I think myself that it is quite possible—I will not say more than that, as the Master of the Rolls reserves the point—that the correct view of some of the other sub-sections of s. 24 is that those sub-sections are in fact retrospective. But the question that we have to consider here is whether an intention appears in the Act that a man who has an acquired right under the Act should lose it when the new Act came into force. I see no such intention at all. I think it is extraordinarily unlikely that anybody intended such a result in the case of a Workmen's Compensation Act. I see no reason for it, and I see no words which necessarily drive me to that conclusion; and, unless the contrary intention does appear, these young men retain their acquired or accrued right.

For these reasons I think that both the learned county court judges arrived at a correct conclusion, and that these appeals should be dismissed.

Solicitors for Thomas Dryden & Sons: *Rawle, Johnstone & Co., for John Taylor & Co., Blackburn.*

(1) Ante, p. 64.

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Solicitors for Vickers, Ld.: *Merton Jones & Lewsey, for J. R. Hanning, Barrow-in-Furness.*

Solicitors for the workman Briggs: *Gibson & Weldon, for John Whittle, Preston and Manchester.*

Solicitors for the workman Talbot: *Bell, Brodrick & Gray, for Joseph Pickavance, Barrow-in-Furness.*

H. C. G.

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[IN THE COURT OF APPEAL.]

TALBOT *v.* VICKERS, LIMITED.

Workmen's Compensation—Infant Workman—Declaration of Liability—Subsequent Incapacity—Application for Review—Date for which increased Compensation to be given—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sch. I., para.* 16.

Upon an application under Sch. I., para. 16, of the Workmen's Compensation Act, 1906, to review the weekly payment payable to a workman who was at the date of the accident by which he was injured under twenty-one years of age, the arbitrator can properly award an increase of the weekly payment as from a date antecedent to the date of the application to review upon having evidence adduced to him that the probable earnings of the workman but for the accident would at that antecedent date have exceeded his pre-accident earnings.

Williams v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* [1914] 2 K. B. 30; 7 B. W. C. C. 124 explained and distinguished.

George Gibson & Co. v. *Wishart* [1915] A. C. 18 applied.

THIS was an appeal by the applicant from a decision of the judge of the Barrow-in-Furness County Court, sitting as arbitrator under the Workmen's Compensation Acts, 1906 to 1923.

The applicant was employed by the respondents as an apprentice caulker, and on December 10, 1917, when he was seventeen years of age, he met with an accident arising out of and in the course of his employment, and as the result of it lost the sight of his eye. He was totally incapacitated until October 3, 1918, and was paid compensation at the rate of 12*s.* 6*d.* a week. Meanwhile, on March 21, 1918, the workman and employers entered into an agreement, which

was duly recorded, under which the employers admitted their liability to pay compensation in the event of the workman being thereafter totally or partially incapacitated from work as the result of his injuries.

On October 3, 1918, the workman was taken on as a sheet iron worker, and continued to work regularly until 1922. He was subsequently unemployed during the following periods: May 18, 1922, to October 3, 1922; November 10, 1922, to February 21, 1924; March 18, 1924, to August 7, 1924; October 11, 1924, onwards.

The workman attained twenty-one years of age on October 21, 1921. On November 19, 1924, he commenced these proceedings for a review and increase of the rate of compensation under the proviso to Sch. I., para. 16, of the Workmen's Compensation Act, 1906. He claimed compensation at the rate of 1*l.* per week on the basis of partial incapacity during the above periods and for the future.

The county court judge took the view that it was necessary to decide, as a preliminary point, whether the workman could obtain increases of the weekly payment for periods prior to the date of the application to review. And he held, without considering the evidence on this part of the case, that on the authority of *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), that no increase could be awarded for any period anterior to the date of the application to review.

The workman appealed.

The county court judge also held that the proviso to Sch. I., para. 16, of the Act of 1906 applied, notwithstanding its repeal by the Workmen's Compensation Act, 1923. An appeal by the employers from this part of the decision was heard with *Briggs* v. *Thomas Dryden & Sons*, and is reported ante, p. 667.

Sir H. Slesser and *R. S. T. Chorley* for the workman. The county court judge has held that he is debarred in law from awarding an increased rate of compensation for any period

(1) [1914] 2 K. B. 30; 7 B. W. C. C. 124.

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anterior to the date of the application to review under the proviso to Sch. I., para. 16, of the Workmen's Compensation Act, 1906. He has not considered whether evidence could be adduced to support such a retrospective increase. In so deciding he has purported to follow the decision in *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), as reported in the headnote in the Law Reports, and he has treated the report in Butterworth's Workmen's Compensation Reports (1) as wrong. There are differences in the judgments as set out in the two reports, but even on the footing of the judgments in the Law Reports, the headnote goes too far. The only decision in that case was that the Court could not grant increased compensation to a workman for an anterior period when no evidence has been called to show that but for the accident he would then have had an increased earning capacity entitling him to an increase of compensation under the proviso to Sch. I., para. 16. That when proper evidence is given the Court can retrospectively vary the compensation is shown by *George Gibson & Co.* v. *Wishart.* (2) There, however, the case did not arise under the proviso, and the only question is whether the words " at the date of the review " in that proviso make any difference. Those words, however, only relate to the amount by which, as a maximum, the compensation may be incurred—namely, " not exceeding 50 per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured."

Greaves-Lord K.C. and *F. W. Beney* for the employers. The report, including the headnote, in the Law Reports of *Bwllfa* v. *Williams and Merthyr Dare Steam Collieries* (1891), *Ld.* (3), is correct. The reports in the Law Journal (3) and Law Times (3) agree with it. The report in Butterworth's reports (3) is wrong. Further, *George Gibson & Co.* v. *Wishart* (2) is a different case. The Court was there dealing with a review under the first part of para. 16 and not with

(1) [1914] 2 K. B. 30; 7 B. W. C. C. 124.

(2) [1915] A. C. 18.

(3) [1914] 2 K. B. 30; 83 L. J. (K. B.) 442; 110 L. T. 561; 7 B. W. C. C. 124.

an application to review under the proviso to para. 16, which is applicable only when the workman was injured while an infant. The proviso gives a special benefit to an infant workman, and in doing so states that an increase of compensation under it is to be given "at the date of the review." All the Court was considering was what the workman had been receiving in excess of the amount allowed him by Sch. I., para. 3, owing to his recovery. The proviso in question here confers a special additional right to a workman injured while a minor "as from the date of the review." As pointed out in *Evans* v. *Vickers, Sons & Maxim, Ld.* (1), the county court judge has under the proviso to para. 16 the task imposed upon him "of saying this lad was injured during minority, and if he had not met with this accident, what is it probable that he, this individual workman, would have been earning at the date of the review? . . . ." There is no right to the increase apart from the proviso.

POLLOCK M.R. This is a cross-appeal to the appeal which we have already decided (2), and is made by the workman against the award by the learned county court judge.

The facts of the case are these. On December 10, 1917, the workman, Alec Talbot, unfortunately had an accident by which he lost his right eye. At that time he was aged seventeen, and was employed as an apprentice caulker. He was paid compensation at first, but on March 21, 1918, a memorandum of agreement was recorded, and that memorandum is as follows: "In the event of the said Alec Talbot being hereafter totally or partially incapacitated for work as the result of the said injury the said Alec Talbot shall be entitled to compensation under the provisions of the Workmen's Compensation Act, 1906, the amount of such compensation to be ascertained, failing agreement between the parties, under the Act, which compensation the said Vickers Limited admit their liability to pay." After that time he was sometimes employed and sometimes out of work. On October 21, 1921, Talbot came of age, and it

(1) [1910] 1 K. B. 554, 558. (2) Ante, p. 667.

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appears from the evidence that although he was suffering from the severe misfortune of the loss of one eye, he was employed up to 1924, not always by Vickers, Ld., but sometimes by another employer. His pre-accident earnings were 12*s.* 6*d.* a week, but after the accident I see that at one time in 1924 he received with overtime as much as 4*l.* a week, and at another time when he was working on time rates he received about 3*l.* 6*s.* a week. Light and special work was given to him as being a one-eyed man. With varying fortunes therefore as to being employed or suffering from unemployment, and with varying wages according to the work that he was given, he undoubtedly was able to make good and earn considerable sums. Then on November 19 he made an application for a review in respect of the amount of compensation which would be payable during incapacity by virtue of the recorded agreement of March 21, 1918.

When the matter came before the learned county court judge he, after hearing argument, dealt with the application as one in which he was bound by the decision in *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), so far as it asked for an increase of compensation during periods anterior to the application for a review.

Following the decision in that case, as reported in the Law Reports, he decided that it was not possible for him to deal with the period antecedent to the date when the application was made for the review—that is, November 19, 1924. He said that "It was necessary to decide a preliminary point, namely, whether the workman could recover an increase of weekly payments for periods prior to the date of the application to review, namely, November 19, 1924"; and he held that what may be called the revised report in the Law Reports bound him, and that the headnote of the case as reported in Butterworth's Cases was inaccurate.

Upon those facts and on appeal from that decision the case comes before this Court. It is argued, and argued with great force, by the employers that the proviso to para. 16 of Sch. I. of the Act of 1906 indicates that what is to be

(1) [1914] 2 K. B. 30; 7 B. W. C. C. 124.

taken into account by the learned judge in a review is the condition of things "at the date of the review." Those words are actually to be found in the proviso. It is said that although the antecedent facts show that the workman both before and after he reached the age of twenty-one was able to earn a great deal more than his pre-accident earnings of 12*s.* 6*d.*, these facts lie outside the sphere which is open to the county court judge.

In my opinion that is not the right view. The question whether the county court judge can take into account facts before the actual review appears to be covered by *George Gibson & Co.* v. *Wishart.* (1) Moreover, there is an inherent difficulty in accepting the construction contended for by the employers, because the application for review in this case was dated November 19, 1924, while the actual evidence before the county court judge was taken on January 14, 1925. In the ordinary course an action operates as from the date when the writ is issued. There seems, therefore, just as much difficulty in construing the words "at the date of the review" as meaning "at the time when the application to review was made" as in giving them any other interpretation. Unless these words mean the actual date on which the order is made to review, there seems little reason to choose one date rather than another, more particularly as there would be in ordinary cases three dates to choose from: first, the date when the application is made; secondly, the date when the evidence is heard; and thirdly, the date when the actual award is made. Those difficulties and uncertainties have, to my mind, a bearing on the construction which we ought to give to the words "at the date of the review." But I do not think that a close examination of the proviso only is the right course to follow.

In *George Gibson & Co.* v. *Wishart* (1) the point before the House of Lords was whether it was possible where a man had completely recovered from his incapacity and a review followed at a later date to make an order that the employer was not to be liable as from the date when the

(1) [1915] A. C. 18, 24, 27, 34.

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incapacity had ceased. It was held that the order ought to speak from the date when the incapacity actually ceased, and not from the date of the review. That decision was reached after consideration of the necessary paragraphs in the Schedule, and there are some observations in the speeches of the learned Lords which, to my mind, really govern this case. Viscount Haldane L.C. points out as a primary consideration that what is brought under review is the continuance and duration of the incapacity. That is in accordance with para. 1 (*b*) of the First Schedule, which provides that "where total or partial incapacity for work results from the injury a weekly payment during the incapacity" is to be made. The weekly payment is payable during and in consequence of the total or partial incapacity resulting from the injury. The words in para. 16, "Any weekly payment may be reviewed," ought therefore to be read as providing for the review of any weekly payment payable during and in consequence of the total or partial incapacity for work resulting from injury. It appears to me, therefore, that Lord Haldane stated very tersely the duty of the Court in the case of a review when he said that what was brought under review was the continuance and duration of the incapacity. He adds: "I think the intention of the Act is to give compensation only during incapacity"; and later he adds again: "No doubt such a review is not in the nature of an appeal or a rehearing. Its character is, as I have already said, rather that of an original application"—an original application to see whether the incapacity continues, or whether it has been increased or diminished. More than that, Lord Atkinson says: "For myself I may say that I utterly fail to see upon what principle of justice a workman is, under a decision awarding to him weekly payments during his incapacity, entitled to receive a single payment after his incapacity has ceased, or that when proceedings for review have been properly instituted the employer is not entitled to have the weekly payments ended from the time the incapacity is proved to have ended, at all events where, as in the present case, the employer has by his application

given the date when he alleges incapacity has ended in fact." In the same case Lord Parker says: "There has been a review, with the result that the liability to make the payment was ended on that date. If it had been a case of partial incapacity, and the workman had alleged a total incapacity as from September 24, 1912, and claimed 16*s.* instead of 14*s.* a week, and the arbitrator had found in his favour, can it be doubted that the 16*s.* a week would have been payable as from September 24, 1912? I think not."

The three learned Lords whose speeches I have referred to therefore clearly indicate that what one has to consider is the incapacity, which may be ended, increased or diminished, and two of them have said that the variation in the amount of compensation has to take place from the time when the actual variation in incapacity in fact occurred. Lord Parker in terms says that if there had been an increased incapacity increased compensation would beyond doubt have been payable. He describes the arbitration as a tribunal set up by the statute for determining and adjusting from time to time, as circumstances alter, the extent and duration of the employers' liability under the Act. Lord Sumner also points out that compensation was given by an award and not a judgment, and that it was intended to be flexible, and Lord Parmoor calls attention to the actual terms of the award, which were for a weekly payment to commence as from a specified date, and to continue during the total or partial incapacity of the workman for work or until the same shall be ended, diminished, increased or redeemed. The very form of the award therefore laid down that it was to be flexible, and that the weekly payment was to endure so long only as the incapacity continued.

Applying that principle to the present case, it appears to me that we ought to read para. 16 as meaning that the weekly payment for incapacity, which under the award was to endure until the incapacity was ended, increased or diminished, "may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished or increased." The very basis on which the payment was

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made was that it could be examined again to see whether the grounds for its payment still remained, and on such review it might be "ended, diminished, or increased." That gives the widest possible flexibility, and, if I interpret the speeches of the learned Lords aright, the paragraph indicates in their view a clear intention that there is to be no hard and fast rule as to a change in the rate of compensation being made from the actual date of review. One has to look to the incapacity on which the award of compensation was based, and to see whether or not that remains as it was or has ceased, diminished or increased. Then para. 16 goes on: "Subject to the maximum above provided." Therefore the review is not to be a review at large, but a maximum limit is laid down beyond which the compensation may not be increased.

I turn to the proviso, which is operative only if two conditions are fulfilled: (1.) that the workman at the date of the accident was under twenty-one years of age, and (2.) that the review takes place more than twelve months after the accident. In a case where those two conditions are fulfilled, then the maximum to apply is not the one referred to in the first part of para. 16; but it is to bear a relation to what the workman would probably have been earning at the date of the review but for the accident. "At the date of the review" is the time when the Court has to consider what is really a hypothetical question, that is, what the workman would have been earning if he had not met with the accident; and no doubt the judge must decide this in the light of the evidence adduced before him at the date when he has to determine the matter. But I cannot find from the structure of the Act or the purpose of the review anything which prevents the award made upon a review operating at a date antecedent to the time when the matter comes before the county court judge. For these reasons I think that the learned judge ought to consider matters antecedent to the date at which he is sitting for the purpose of the review, and, following *George Gibson & Co.* v. *Wishart* (1), to come to a decision when he has heard the evidence.

(1) [1915] A. C. 18.

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I want to say a word about the case which led the learned judge to decide otherwise. *George Gibson & Co.* v. *Wishart* (1) was heard before the House of Lords on April 21, 1914. *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (2), was heard before the Court of Appeal on January 22, 1914, and it is probable that those who argued the former case in the House of Lords either were not aware of or had not available the decision that had been given in the latter case by the Court of Appeal. But it appears to me that the decision in the latter case as reported in Butterworth's Reports is more consonant with the decision in *George Gibson & Co.* v. *Wishart* (1) than is the amended report of the same case in the Law Reports. In *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (2), an alteration had been made by the county court judge in the compensation payable during a period anterior to the review, although he had not received any evidence at all as to the facts during that particular period; and the decision of the Court of Appeal is sufficiently explained as a decision that, as there was no evidence relating to the anterior period, there was no foundation on which the county court judge could base an award giving a larger weekly sum to the workman during that period. That is how the matter stands, I think, upon the report as printed in Butterworth's Reports. In the Law Journal and in the Law Reports a different report appears. There is to be found there this statement by Sir Samuel Evans P.: "We have been invited to give a construction to this section, and the construction which I think it ought to receive in order to give effect to its plain meaning is that the youth, if at any time more than twelve months after the accident he thinks he would then probably be earning more than he was at the time of the accident if he had remained uninjured, can apply to review, and the judge must then ask himself what would have been his probable earnings at the time of the review; and give a percentage of that. That has not been done in this case, and I think, therefore, the employers' appeal succeeds

(1) [1915] A. C. 18.
(2) [1914] 2 K. B. 30, 34; 7 B. W. C. C. 124.

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and must be allowed with costs." It appears to me that even those words when read in connection with the facts are to be regarded as only dealing with a case in which there was no evidence on which the decision could be based, and that it is because there was no evidence in that case relating to a period anterior to the review that the learned judge holds that the award was incorrect. Eve J. does indeed say something more, and he indicates that the time from which the jurisdiction of the judge operates is the moment of time at which the inquiry is initiated. If that case is not to be taken as a decision in relation to the actual facts, which indicate that there was no evidence relating to a period anterior to the time of the review, then I think it is inconsistent with the reasoning in *George Gibson & Co.* v. *Wishart* (1), and cannot be supported. If, however, regard is had to the report in Butterworth's Cases, then I think it is a decision based upon the actual consideration of the facts in that case, and that it was because there was no evidence as to the true position anterior to the date of the review, that there was no right on the part of the county court judge to go behind that date.

In my opinion we are in effect bound in the present case by the decision in *George Gibson & Co.* v. *Wishart* (1), and we must hold that it is open to the county court judge to take evidence as to the position during the antecedent period between the lapse of twelve months from the accident and the time of the review, and to apply his mind to the question whether the compensation awarded ought to be increased or diminished over any part of that period, and to give an award upon the facts accordingly.

For these reasons I think the appeal must be allowed and the case remitted to the county court judge to hear the evidence as to the antecedent period and come to his own conclusion as to what the award ought to be.

WARRINGTON L.J. I am of the same opinion. The workman, a boy of seventeen years of age, suffered on

(1) [1915] A. C. 18.

December 10, 1917, an injury by accident resulting in the loss of his right eye. On March 21, 1918, an agreement was recorded, which after stating that the accident arose out of and in the course of the employment provided that in the event of the workman "being hereafter totally or partially incapacitated for work as the result of the said injury" he "shall be entitled to compensation under the provisions of the Workmen's Compensation Act, 1906, the amount of such compensation to be ascertained, failing agreement between the parties, under the said Act, which compensation the said Vickers Limited admit their liability to pay."

On November 19, 1924, the workman presented his request for arbitration with reference to the amount of the compensation payable to him under the agreement, and according to the particulars of the amount claimed he said that he claimed compensation at the rate of 1*l.* a week on the basis of partial incapacity during the periods there set out, the last of which was from October 11, 1924, to the date of the application for review. The learned county court judge, dealing with the matter as a preliminary point and resting himself mainly on *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), held that he had no jurisdiction to go further back than the date of the application, and therefore was unable to award any compensation for the earlier periods mentioned in the particulars; and having dealt with the matter as a preliminary point he of course did not hear any evidence directed to it. The question we have to decide is whether the county court judge had jurisdiction to award compensation for those periods of partial incapacity which were prior to the date of the application for review. That is the primary question we have to determine. But if that question is determined in favour of the workman, then arises the further subsidiary question whether, assuming he has that jurisdiction, he can under the proviso take into account what the workman would probably have been earning at those anterior dates,

(1) [1914] 2 K. B. 30; 7 B. W. C. C. 124.

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or whether under the proviso the only material date is the date, as the learned county court judge seemed to have thought, of the application for review.

With regard to the general question I think there is no doubt, because the matter is settled finally, so far as this Court is concerned, by the decision of the House of Lords in *George Gibson & Co.* v. *Wishart.* (1)

The application came before the county court judge under Sch. I., para. 16, which provides: "Any weekly payment may be reviewed at the request either of the employer or of the workman, and on such review may be ended, diminished, or increased subject to the maximum above provided, and the amount of payment shall, in default of agreement, be settled by arbitration under this Act." In *George Gibson & Co.* v. *Wishart* (1) it was alleged that the workman had recovered from his incapacity before the date of the application for review; but he contended that, although he had recovered before the date of the review, the review could not take into account that anterior recovery and deprive him of compensation as from its actual date. It was that contention on the part of the workman which was negatived by the House of Lords. But I think I am right in saying that each one of the learned Lords who addressed the House expressed the view which follows logically from that decision, that if the right to diminish or terminate the compensation as from an earlier period was within the competence of the arbitrator, it must also be within his competence to increase the compensation retrospectively. I need not read the opinions to this effect expressed by all of the Lords who were then present. It is enough, I think, to read that of Lord Sumner (1): "There is nothing in the mere language of that paragraph"—that is para. 16—"to limit the power of review in respect of the date at which the decision on the review may begin to operate." The object of the power of review obviously is to enable the tribunal from time to time to adjust the payment of compensation to the incapacity, so that, in justice to both

(1) [1915] A. C. 18, 43.

parties, the amount payable may increase or diminish as the incapacity increases and diminishes and so that both may terminate together. Nothing can be clearer than that, and in my judgment the House of Lords in *George Gibson & Co.* v. *Wishart* (1) settled the question so far as concerns the application of para. 16 itself, by deciding that the review, whether the object of it is to terminate, increase or diminish the payment, may be retrospective and go back beyond the date of the application.

Then arises the subsidiary question under the proviso to para. 16, which we have already held to be applicable in this case, notwithstanding its repeal by the Act of 1923. (2) The proviso is in these terms: "Provided that where the workman was at the date of the accident under twenty-one years of age and the review takes place more than twelve months after the accident, the amount of the weekly payment may be increased to any amount not exceeding fifty per cent. of the weekly sum which the workman would probably have been earning at the date of the review if he had remained uninjured, but not in any case exceeding 1*l.*" The first thing to be observed with reference to this proviso arises out of the words which I have already referred to in what I will call the body of para. 16: "On such review," the weekly payment "may be ended, diminished, or increased subject to the maximum above provided." The maximum "above provided" is that which is contained in para. 3 of the same Schedule, but that is a maximum applicable only to an adult workman; and the object of the proviso was to alter that maximum in the case of an infant workman, and for obvious reasons, because the infant who is totally or partially incapacitated by an injury by accident loses not only the capacity of earning that which as an infant he was then able to earn, but it may be, the increase of earnings which would become payable to him as he advanced in years. Therefore the maximum provided for in para. 3 of the case of an adult is modified by the proviso to para. 16 in the case of an infant, and a different maximum is applied.

(1) [1915] A. C. 18, 43. (2) Ante, p. 667.

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That is all that it does; and when once this is understood, I think there is very little difficulty in understanding what is meant by the expression "At the date of the review." Under para. 16 it is settled that the review may be retrospective, and it follows, I think, that this expression in the proviso means neither the date when the workman applies for the review nor the date when the county court judge sits to hear that application, but the date at which under para. 16 the weekly payment is either increased or diminished. If that be the true construction, then the whole difficulty is removed; under the body of the paragraph the review may go back to an anterior period, and "the date of the review" will therefore be the anterior date as from which the review when effected actually takes place.

Any other construction seems to me to involve enormous difficulty. The date which was adopted by the learned judge is the date of the application to review. How that can possibly be the date of the review I cannot understand. It may be postponed by all kinds of accidents. The workman may have been incapacitated as the result of the accident to such an extent that he was incapable of making the application before the date at which he made it. On the other hand, if you were to take the date of the hearing by the county court judge, then you get this absurdity, that the right of the workman to compensation depends upon the accident of there being more or less business at the particular Court or upon the opportunity which the county court judge may have of giving a speedy hearing to the particular application. It seems to me that when once it is realized that the review may be retrospective the only possible interpretation of the words in the proviso is that the date of the review is the date at which the weekly payment is, as the result of the review, either increased or diminished.

For these reasons, independently of authority, I think the learned judge was wrong in the conclusions at which he arrived, and that the matter must go back to him in order that he may hear the evidence with reference to these anterior periods. But the learned county court judge rested himself

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on the authority of *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1) The point which arose there for decision, as is brought out quite clearly in Butterworth's Reports, was whether the county court judge had been justified in awarding compensation for a period anterior to the date of application on evidence which related only to that date, and the real decision of the Court of Appeal was that his award for that anterior period was unsupported by evidence, and therefore was not justified. The two learned Lords Justices who gave judgment at length stated that they had been requested to express their views on the general construction of the proviso; and I will assume for a moment that in the judgments as reported in the Law Reports they expressed the opinion that "the date of the review" in the proviso meant the date at which the application for review was made. They certainly do not appear in Butterworth's report of the case to have expressed their opinion with the same clearness as they did according to the Law Reports, and the conflicting nature of the reports renders the case exceedingly unsatisfactory. But however that may be, the decision was arrived at in January, 1914, and *George Gibson & Co.* v. *Wishart* (2) was decided in June, 1914; and the two cases cannot stand together. *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), was not cited in the House of Lords; very likely the reports of it had not appeared when the House of Lords case was heard. At any rate it was not cited; and the two decisions cannot stand together. I think therefore that so far, if at all, as *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), has hitherto been regarded as an authority on the general construction of the proviso to para. 16, it must be taken to be overruled by the decision of the House of Lords in *George Gibson & Co.* v. *Wishart.* (2) On the whole I come to the conclusion that this case must go back to the county court judge.

ATKIN L.J. I agree. I do not regard this as a very simple

(1) [1914] 2 K. B. 30; 7 B. W. C. C. 124. (2) [1915] A. C. 18.

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case, and I am not at all surprised at the decision of the learned county court judge, that the case of *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), compelled him to come to the conclusion that he could not retrospectively review the workman's compensation on the footing of the proviso to para. 16. Looking at the report in the Law Reports of that case, I am bound to say that I think the county court judge had some reason for coming to this conclusion. I think, however, that on a close examination of that case and the subsequent authorities it will be found that it is not such a binding decision as he considered it to be.

The first thing to remember in dealing with the present case is that we are dealing with it upon the footing that the workman's claim is solely a claim under the Workmen's Compensation Act, 1906. We have already decided that he had an acquired or accrued right under that Act, which he did not lose by any amendment made in the Act of 1923. (2) Therefore we have to regard his rights as given by the Act of 1906, and for that purpose we must ignore the Act of 1923 and look only to the Act of 1906. In those circumstances, what is the position in respect of the proviso to Sch. I., para. 16? The position of an injured infant workman was no doubt intended to be protected by that proviso. Apart from that, the infant's compensation could only be judged by reference to his pre-accident earnings. In the case of the infant it might amount to 100 per cent. of his pre-accident earnings, with the limit, in the case of partial incapacity, of 10*s.* a week, and in the case of total incapacity, of 20*s.* a week, together with, of course, the war additions that have been made by subsequent Acts which for this purpose are irrelevant. Para. 16 of the First Schedule gives the right to review the compensation paid in the case of an adult and in the case of an infant. The suggestion that is made by the employers in this case is that when you come to review an infant's compensation under the terms of the proviso there are two

(1) [1914] 2 K. B. 30; 7 B. W. C. C. 124. (2) Ante, p. 667.

standards of compensation which the judge is entitled, or indeed is bound, to give effect to. I say two, because it is now beyond discussion that the judge is entitled to review the compensation retrospectively. That, of course, is necessary for the purpose of giving anything like effective compensation to the workman. Partial incapacity may increase or become total incapacity, so as to entitle the workman to further compensation. So, too, what has not been treated as partial incapacity, because the workman has been able to earn wages after the accident equal to his pre-accident earnings, may yet have resulted in a state in which there is a lack of earning capacity, and he may cease to earn the equivalent of his pre-accident earnings. That is the kind of case where there has been a declaration of liability or an agreement equivalent to a declaration of liability, and the workman has ceased to be in a position in which he can earn the equivalent of his pre-accident earnings. In all those cases a review is necessary, and, as I say, the House of Lords has held that that review can be retrospective.

In the case of an adult no difficulty arises. The same standard is applied when the compensation is reviewed, and it is applied both in respect of the retrospective period, the period before the actual decision of the judge, and the period after the actual decision of the judge. But in the case of an infant, it is said that the Legislature has made a different provision, and that, whereas up to the hearing of the application for a review by the county court judge, he can, in making a retrospective review, have regard only to the pre-accident earnings, for the period after his decision, he can give effect to the proviso to para. 16 and award compensation on the footing not of the pre-accident earnings, but what, for shortness, I will call the probable earnings after the accident. To my mind there is no indication in the section of there being that double standard, and there seems to be no reason at all for it. It would certainly mean that the policy of the Act would be defeated. The Legislature has recognized, in awarding compensation to an infant, that, as when he was injured he had not arrived

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at the full measure of his ability, his compensation should increase progressively with what his progressive earning capacity would have been if he had remained uninjured. To my mind, the construction sought to be put upon the proviso to para. 16 by the employers is not the true construction. The language of para. 16 has been very carefully considered in *George Gibson & Co.* v. *Wishart* (1) by the House of Lords. I by no means suggest that the learned Lords in expressing their opinion in that case had in their mind the particular words of this proviso or that they were in fact intending to construe this particular proviso in relation to the contentions that are now raised, yet their language seems to me to be very helpful, and in addition to the passages which have already been referred to, I should like to read one passage in the speech of Lord Sumner (2): "So far as the decision in the case of *Donaldson & Co.* v. *Cowan* (3) overruled the cases of *Steel* (4) and of *Pumpherston* (5), and held that the review might go back to a date anterior to the decision on the review, it seems to me that it was indubitably right." I should like to emphasize for the purpose of my decision the distinction drawn there between the review and the decision on the review, and I think that the true construction of "the date of the review" is the date from which the weekly payment of compensation is in fact ended, diminished or increased by the decision on the review.

If that be so, it follows, I think, that the learned judge was entitled, indeed was bound, to consider the application made by the workman in this case for a retrospective review on the footing of the proviso. The facts of this particular case illustrate in a rather striking way the importance of this question to the workman. This is a case where the workman was injured when he was only a boy of seventeen and when his pre-accident earnings were 12*s.* 6*d.* a week. He has had employment from time to time, but there have

(1) [1915] A. C. 18.
(2) [1915] A. C. 18, 41.
(3) [1909] S. C. 1292.
(4) (1902) 5 F. 244.
(5) (1903) 5 F. 963.

been periods of incapacity from time to time, and he has lost one eye, and the sight of the other eye has been reduced to one-sixth of the normal vision. When he comes to make his application for the review he is a man of twenty-four years of age. I do not suppose he is married, but there are many working men at that period of life who are married and have families; and this man had been earning for two years before something like 66*s.* a week, and at one time had earned, with overtime, something like 80*s.* a week. The construction sought to be put upon the proviso by the employers would involve this, that in respect of no period before the date of the application for a review could that workman receive as compensation (apart from the war addition) more than, in the case of partial incapacity, 10*s.* a week, and, in the case of total incapacity, 100 per cent. of his pre-accident earnings, with a limitation of 1*l.*

As I have already stated, it is said that *Williams* v. *Bwllfa and Merthyr Dare Steam Collieries* (1891), *Ld.* (1), compelled the learned judge and compels us to hold the contrary of what I have said to be the true view of the section. I do not take that view. To my mind, the only decision in that case was that there was no evidence upon which the learned judge could in fact have awarded compensation retrospectively at a higher rate than the pre-accident earnings, because the workman, on whom the onus lay, had given no evidence at all of his probable earnings at any period other than that at which the review was actually taking place. I think that is the total extent of the decision so far as it is a decision. It is true there are dicta, and I think on the whole that the dicta rather go to support the view taken by the learned county court judge, although I am not quite clear about that. I think the dicta as reported in Butterworth do not go so far. I think the dicta as reported in the Law Reports do in some passages of the President's judgment go so far, although there are other expressions in the same judgment which seem to indicate that, after all, he was only considering the question whether the learned judge had evidence on

(1) [1914] 2 K. B. 30; 7 B. W. C. C. 124.

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which he could adopt the high standard of compensation. Inasmuch as that case was decided before the decision in the House of Lords and without the opportunity of hearing the way in which the learned Lords expressed themselves as to the meaning of "review," it appears to me that we are not compelled by anything in it to come to a different conclusion from that which we have expressed. The result is that this case must go back to the learned county court judge for the purpose of his dealing with the request for a retrospective review in accordance with the views which this Court has expressed.

Solicitors: *Bell, Brodrick & Gray, for Joseph Pickavance, Barrow-in-Furness; Merton Jones & Lewsey, for J. R. Hanning, Barrow-in-Furness.*

H. C. G.

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April 30; *May* 8.

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Landlord and Tenant—Rent Restriction—Dwelling-house—Conversion into Business Premises—Mere User—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 2 (ii.); *sub-s.* 6.

By an agreement of tenancy made in 1912 the predecessor of the plaintiff agreed to let to the defendant, a herbalist, premises consisting of a shop and dwelling-house at a yearly rent which was within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. The defendant took possession of the premises under the agreement, and until 1918 he and his wife and son lived in the residential part and carried on business in the shop. In that year they removed to another house, but continued to carry on business and to have their meals, except breakfast, at the said premises. Their son, who managed the business, slept at the premises from two to four times a week down to the end of 1923, and about once a week in 1924, and on each occasion he had all his meals, including breakfast, there. Parcels of stock and empties were kept from time to time in the residential rooms. In 1924 the plaintiff brought an action in the county court to recover possession of the premises on the ground that they had ceased to be a "dwelling-house" within the Act of 1920, and had become entirely business premises. The county court judge found on the facts that there had been no such change of user as to destroy the character of dwelling-house with which

the premises were impressed by the tenancy agreement, and gave judgment for the defendant:—

Held, on appeal, that there was evidence to support the finding of the county court judge and that the appeal should be dismissed.

Whether the tenant of premises which are a "dwelling-house" within the meaning of the Increase of Rent, &c. (Restrictions), Act, 1920, can, without the consent of the landlord, by mere disuse of the premises for residential purposes, or user of them for non-residential purposes, take them out of the Act: Doubted by Salter J.

If the tenant of premises originally let in part for residential purposes and in part for business purposes should, with the acquiescence of the landlord, entirely cease to use them as a dwelling-house and should use the whole of them for business purposes, the premises would be taken out of the Increase of Rent, &c. (Restrictions), Act, 1920, and could only be described as business premises: So held by Greer J.

APPEAL from Sheffield County Court.

By an agreement in writing dated October 21, 1912, the then owner, the predecessor of the plaintiff, Percy Hyman, agreed to let to the defendant, G. H. Steward, "all that saleshop and dwelling-house," No. 17, South Street Moor, Sheffield, as from August 13, 1912, at a rent of 70*l.* per annum payable quarterly, the tenant paying all rates and taxes except income and property tax, the tenancy to be determinable on either side by six months' notice in writing, to expire on August 13 in any year. The premises comprised a ground floor consisting of a shop and a living room behind it, a basement in which there was a kitchen, and above the ground floor a sitting-room, two bedrooms and a storeroom. The defendant and his wife took possession of the premises in the summer of 1912, and dwelt there until 1918, living in the residential part and carrying on business in the shop. In 1918 they removed to another house, and had not lived in the premises since. They continued to carry on business in the shop, and were doing so still. They continued to have their meals, except breakfast, in the room behind the shop. Their son, who managed the business and was often kept late at work, was in the habit of sleeping in one of the bedrooms on the first floor from two to four times a week down to the end of 1923, and about once a week in 1924, and on each of these occasions he had all his meals, including breakfast, on the premises. Cooking utensils were kept in the room

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behind the shop, and were used. After 1918 parcels of stock were kept from time to time in the front sitting-room, and "empties" were kept in the back bedroom. A notice to quit the premises, dated February 5, 1924, was served by the plaintiff on the defendant, but was not complied with.

In the end of 1924 the plaintiff brought this action in the county court, claiming possession of the premises as a "lock-up sales shop" and mesne profits. The defendant alleged that the premises were a "dwelling-house" within the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (1)

On January 27, 1925, the action came on for trial. Evidence was given on behalf of the plaintiff and of the defendant respectively, and the facts above stated were proved. The defendant stated in cross-examination that the premises were at the time of the action a lock-up shop, and he stated in answer to the judge that before he received notice to quit he had made up his mind that a Mr. Holmes, who was employed by him in the business, should live on the premises.

The county court judge in giving judgment said that he found on the facts that there was no sufficient evidence of change of user to destroy the character of dwelling-house with which the premises were impressed by the agreement of tenancy; that the use of the premises as a dwelling-house had been in abeyance, but that the defendant informed him that Holmes was going to live there; that if Holmes did not do

(1) The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provides:—

Sect. 5: "(1.) No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless . . . . " on the grounds therein mentioned.

Sect. 12: "(2.) This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" certain specified amounts.

"Provided that . . . .

"(ii.) the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes; . . . .

"(6.) Where this Act has become applicable to any dwelling-house or any mortgage thereon, it shall continue to apply thereto whether or not the dwelling-house continues to be one to which this Act applies."

so and the case came before him (the judge) again he might find that the character of the premises was changed, but that at present he did not think there was sufficient evidence of conversion to take the premises out of the Act; and he accordingly gave judgment for the defendant.

The plaintiff appealed.

Mortimer K.C. (*Coddington* with him) for the plaintiff, appellant. The plaintiff is entitled to recover possession of the premises in question.

The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 1 (1), no doubt provides that no order or judgment for the recovery of possession of any dwelling-house shall be made or given except on certain conditions; but that provision implies that a tenant can only resist the making of an order or judgment for the recovery of possession of premises where the premises are a dwelling-house to which the Act applies. The authorities show that premises which have been originally let as a dwelling-house may entirely lose their status as a dwelling-house and become business premises. Thus it has been held that such an alteration of status may be effected by a physical change in the structure of the premises: *Phillips* v. *Barnett* (2); by the letting of the premises solely as business premises: *Williams* v. *Perry* (3); by the separate letting of two portions of the dwelling-house consisting respectively of a residence and a shop: *Phillips* v. *Hallahan* (4); and by the furnishing and letting furnished of a dwelling-house which had previously been let unfurnished: *Prout* v. *Hunter*. (5)

Further, it is submitted that mere change of user is sufficient to convert a dwelling-house into business premises. That proposition is supported by the analogy of the cases already cited. It is also supported by the case of *Liverpool Co-operative Society* v. *Costigan* (6), in which it was held that where premises were let in part as a dwelling-house and in

(1) See note (1) ante, p. 704.
(2) [1922] 1 K. B. 222.
(3) [1924] 1 K. B. 936.
(4) [1925] 1 K. B. 756.
(5) [1924] 2 K. B. 736.
(6) (1923) 156 L. T. J. 413.

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part as a shop, and the tenant applied the former part to business purposes, that part ceased to be a dwelling-house; and although that case, having been decided in the county court, is not binding on this Court, it appears to have been rightly decided and should be followed. Sect. 12, sub-s. 2, proviso (ii.), of the Act implies that the application of the Act to a house would be excluded if the whole of the premises were used for business purposes. In every case in which the question arises whether the premises are a dwelling-house, what has to be determined is the real and substantial purpose for which the premises are used: *Greig* v. *Francis and Campion*. (1)

For the purposes of an action by the landlord to recover possession of the premises the material time at which the status of the house is fixed is not the date of the contract of tenancy but the date of the action: see *Prout* v. *Hunter*. (2)

In the present case the premises were let as a shop and dwelling-house and were at first used in both capacities, and so long as they were so used they were no doubt a "dwelling-house" within the meaning of the Act of 1920: see s. 12, sub-s. 2, and proviso (ii.) to that sub-section. The evidence shows, however, that in and since 1918 the defendant and his family, while continuing to use the shop as such, ceased to live in the residential part of the premises and used that part also only as a shop, and that at the respective dates of the notice to quit, and the commencement and hearing of the action, the premises as a whole had ceased to be a dwelling-house and had become business premises only. The county court judge was wrong in finding that there had not been a change of user which destroyed the character of dwelling-house which the premises originally bore.

Premises demised as a dwelling-house may be converted into business premises by agreement between the parties: *Williams* v. *Perry* (3); and under the tenancy agreement in the present case the premises must be taken to be relet each year, so that the plaintiff by acquiescing in their user

(1) (1922) 38 Times L. R. 519. (2) [1924] 2 K. B. 736.
(3) [1924] 1 K. B. 936.

as business premises has in effect relet them as business premises.

The Act of 1920 was intended to protect a tenant from ejectment who had no other available residence, but not a tenant who, like the present defendant, is in occupation of another house.

E. W. Cave K.C. (*Willoughby Jardine* with him) for the defendant, respondent. The plaintiff is not entitled to recover possession of the premises.

In order to find whether premises let under an agreement of tenancy are or are not a "dwelling-house" within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, regard must be had to the provisions and words of the Act itself. Sect. 12, sub-s. 2, provides that the Act shall apply to a house let as a separate dwelling where the standard rent or rateable value does not exceed a specified amount, and proviso (ii.) to that sub-section provides that the application of the Act to any house shall not be excluded by reason only of the fact that part of the premises is used as a shop or office or for business purposes. The several provisos to the sub-section all regard the letting as the important matter. The sub-section provides that the Act shall apply to a house "let" as a separate dwelling, and not to a house "let and occupied," or "let and used" as a separate dwelling. If the word "let" be understood in its natural sense, then all that need be done in order to find whether premises are let as a dwelling-house is to look at the agreement of tenancy. If "let" be construed as meaning "let and used" then in order to find whether the premises are let as a dwelling-house it will not be sufficient to refer to the tenancy agreement, but it will be necessary further to enter into an inquiry which may be long and difficult as to the nature and extent of the user of the premises.

Sect. 12, sub-s. 6, means that premises originally let as a dwelling-house are always to continue to be a dwelling-house. Sect. 15, sub-s. 1, provides that a tenant who by virtue of the Act retains possession of any dwelling-house to which the

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Act applies shall, so long as he retains possession, be entitled to the benefit of all the terms and conditions of the original contract of tenancy so far as consistent with the Act. The Act might easily have provided that where a dwelling-house ceased to be used as such it should cease to be a dwelling-house, but it has not done so.

It appears from s. 12, sub-s. 2, that the status of the demised premises is determined by the purpose for which they are originally let: see *Prout* v. *Hunter*. (1)

There is no authority binding on this Court which decides that, where premises have been demised as a dwelling-house, the tenant can by mere non-user or by mere user for purposes other than those of a dwelling-house, alter the character of the premises as a dwelling-house. The High Court cases which have been cited only decide that a dwelling-house may be converted into business premises by destruction of the identity of the premises or by a new agreement. The only case in which it has been held that mere user can convert a dwelling-house into business premises is the county court case of *Liverpool Co-operative Society* v. *Costigan* (2), which is not binding on this Court and which it is submitted was wrongly decided and should be disregarded.

In the present case the premises were let by the agreement of tenancy as a shop and dwelling-house, and they were therefore then and have ever since continued to be a "dwelling-house" to which the Act applies. Even if the character or status of demised premises could be altered by mere non-user or user for some purpose other than that intended, there was here abundant evidence to show that the defendant never ceased to use the residential part of the premises as a dwelling-house, and the finding of the county court judge to that effect was right and should not be disturbed.

Mortimer K.C. in reply. The status of the demised premises is not determined by the purpose for which they were originally "let," but by the purpose for which they were used at the

(1) [1924] 2 K. B. 736. (2) 156 L. T. J. 413.

date of the action for recovery of possession. Premises may have the status of a dwelling-house as between mortgagor and mortgagee though they are not "let" to any tenant: *Woodifield* v. *Bond*. (1)

SALTER J. This is an action by the landlord against the tenant for possession of the demised premises, and the question raised in the county court and on appeal in this Court is whether the premises were or were not at the date of the action a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applied. The county court judge held that the premises were a dwelling-house and this Court has now to determine whether or not he was wrong in law in so holding. [His Lordship, after reading the relevant provisions of the agreement of tenancy and stating the facts at length, continued as follows:] To summarize these facts, the part of the premises which was let as a shop has at no time undergone any change of user but has all along been used in the manner contemplated by the contract of tenancy. As to the part of the premises which was let for residential purposes, instead of a complete and constant user of that part of the premises as a dwelling-house, there has been a partial and occasional user of it as such which has never ceased. There has also been a partial use of the residential part of the premises for business purposes, and since 1918 a portion of that part of the premises has not been used for any purpose.

The county court judge in giving judgment said that he found on the facts that there was no sufficient evidence of change of user to destroy the character of dwelling-house with which the premises were impressed by the lease; that the use of the premises as a dwelling-house had been in abeyance, but that the defendant had informed him in evidence that Holmes, the proposed manager of the business, was going to live there; that if Holmes did not live there and the case came before him (the judge) again he might find

(1) [1921] W. N. 309.

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the character of the premises changed; but that at present he did not think there was sufficient evidence of conversion to take the premises out of the Act.

There is no question that the premises were at the time of the letting in 1912 a dwelling-house within the meaning of the Act. The case was argued both in the county court and in this Court on the footing that the premises continued to be a dwelling-house from 1912 to 1918. The only question is whether they ceased to be a dwelling-house by reason of the events which have happened since 1918. Notwithstanding s. 12, sub-s. 6, of the Act of 1920, there are cases in which a dwelling-house to which the Act applies can cease to belong to that class, for example, in the case of the destruction of the identity of the premises: *Phillips* v. *Barnett* (1); and where the landlord has regained possession of the premises and relets them for non-residential use: *Williams* v. *Perry*. (2) Again if the premises are let, or sublet, furnished, they enter a class which is expressly excluded from the Act by its terms. There remains the question whether, apart from these cases, the tenant can by mere disuse, or by use of the premises for non-residential purposes without the landlord's consent, take the demised premises, during the continuance of the tenancy, out of the class of dwelling-houses to which the Act applies. It may be said that the second proviso to s. 12, sub-s. 2, suggests that the use by the tenant of the whole of the demised premises for business purposes will take the premises out of the Act. I doubt whether the tenant by his mere use, or disuse, of the demised premises, without the landlord's knowledge or consent, can either take a house out of the Act, or bring a house within the Act. It is not, however, necessary to decide this question in the present case. Assuming, as the county court judge assumed, that the tenant can, by his user of the demised premises, "convert" them from premises to which the Act applies to premises to which the Act does not apply, it is obvious that such user must be complete and unmistakable. Here, there was

(1) [1922] 1 K. B. 222. (2) [1924] 1 K. B. 936.

ample evidence on which the learned judge could refuse to find the conversion proved. There was therefore no error in law.

GREER J. I am of the same opinion. This is an action in which the plaintiff as landlord seeks to recover from the defendant as tenant possession of premises known as No. 117 South Street Moor, Sheffield. The defence is that the premises are a dwelling-house to which the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies, that none of the facts required to be proved by that sub-section in order to exempt a dwelling-house from its operation have been proved by the defendant, and therefore that by that sub-section no order or judgment for the recovery of the premises can be made, but that the defendant is entitled to retain possession of them. The plaintiff contends that the premises were not a dwelling-house at the time when the action was brought, and the county court judge had to inquire whether they were or were not a dwelling-house at that time. In order to ascertain whether the premises were a dwelling-house at that time it is necessary to consider the provisions of s. 12 of the Act. Sub-s. 2 of that section provides "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed" a specified amount exceeding the figures applicable to the premises here in question "and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies." The second proviso to that sub-section is as follows: "(ii.) the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes." When the premises here in question were first let part of them was used as a shop or office and was intended to be so used, and it has since continued to be so used. The rest of the premises was at first let and used as a dwelling-house. It is thus clear that the premises as a whole when originally let were

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within s. 12, proviso (ii.), and were therefore a dwelling-house to which the Act applied. It is contended, however, on behalf of the plaintiff, that the evidence shows that at the time when the action was brought the defendant had entirely ceased to use any part of the premises as a dwelling-house; and it is argued that, although the premises when originally let were within the proviso, the defendant was protected by the Act only so long as he used them partly as a dwelling-house and partly as a shop, and that as at the time of the action he had ceased to use them as a dwelling-house, they have ceased to be within the proviso, and the Act no longer applies to protect him.

The words of the Act create considerable difficulties of interpretation. If s. 12, sub-s. 2, be looked at apart from proviso (ii.) it would seem to mean that in order to ascertain whether the premises are within the Act regard should be had to the terms of the agreement of tenancy. If, on the other hand, proviso (ii.) be looked at, it seems to mean that regard should be had not to the terms of the tenancy, but to the use to which the premises have been put by the tenant. If in this case the question arose whether a tenant by his user or non-user of the demised premises could alter their character as a dwelling-house, there might have been room for considerable differences of opinion. I confine myself to saying that if there had been a complete change of user of the premises by reason of the defendant entirely ceasing to use them as a dwelling-house and using them all for business or trade purposes, and if the plaintiff had not interfered and was estopped by acquiescence from preventing the altered user of the premises as business premises, I think that the premises could then have been described as premises let entirely for business purposes, and not partly for residential and partly for business purposes. But, be that as it might, the facts of the present case do not give rise to that question, because it cannot here be said that the county court judge was wrong in finding that the facts proved fell short of showing a change from the user of these premises as a dwelling-house and business premises to a user of them as business premises

only. I agree that the judgment of the county court judge cannot be disturbed, and that this appeal should be dismissed.

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Appeal dismissed.

Solicitors for appellant: *Torr & Co., for Oxley & Coward, Rotherham.*

Solicitors for respondent: *Jackson & Jackson, for J. W. Fenoughty, Sheffield.*

J. R.

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May 28; *July* 31.

Landlord and Tenant—Lease of Premises—Premises divided by Lessee—Part let as Dwelling-house—Part retained by Lessee as Garage—Claim by Landlord for Possession of Whole of Premises—Possession of Garage—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *ss.* 5, 12.

Certain premises were leased in 1865 for a term expiring on December 25, 1923, under the description of all that piece of ground . . . . with the warehouse thereon erected. Before 1913 the lessee's interest became vested in A. and R., who on November 17, 1913, sublet the premises to the defendant under the description of "all that piece of ground . . . . with the coachhouse and stable thereon erected" for a period expiring December 22, 1923. There was no evidence when the premises were converted from a warehouse into a coachhouse and stable, but before the sub-lease to the defendant the premises had been used as a coachhouse and stable with living rooms for the coachman on the upper floor. The defendant converted the premises into a garage with living rooms over, the living rooms having a separate and independent entrance, and occupied them by keeping cars in the garage and by his chauffeur using the living rooms not as tenant but as servant. On September 1, 1922, the defendant let the living rooms to W. as a dwelling-house, but continued in occupation of the garage. In July, 1924, after the expiration of the head lease and the sub-lease to the defendant the freeholders leased the premises to the plaintiff, who brought an action against the defendant for the possession of the whole of the premises or alternatively for possession of the garage:—

Held, first, that the plaintiff was not entitled to an order for possession of the living rooms, as they were in the occupation of a tenant to whom they had been validly sublet by the defendant and who was holding over and was protected by s. 5, sub-s. 1, of the Rent Restriction Act, 1920. The fact that the defendant was not himself in actual possession of the premises as a dwelling-house did not prevent him from claiming the benefit of the Rent Restriction Acts, as the claim was for actual

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possession, and an order for possession would be executed against whoever was on the premises.

Secondly, that the plaintiff was entitled to an order for possession of the garage, as that portion of the premises had been separated from the portion of the premises let off as a separate dwelling-house, and at the time the action for possession was brought was being used solely for business purposes, and therefore not within the definition of a dwelling-house to which the Act applied.

Prout v. *Hunter* [1924] 2 K. B. 365, 736 and *Phillips* v. *Hallahan* [1925] 1 K. B. 756 followed and applied.

APPEAL from the deputy judge of the Bloomsbury County Court.

The plaintiff brought an action for possession of certain premises consisting of a garage with living rooms above, known as No. 6 Galen Place, Bloomsbury.

On March 20, 1865, the Duke of Bedford and the trustees of the Bedford estate, who are the freeholders, let the premises in question to George L. Neighbour for sixty years from Christmas, 1863, under the description of "All that piece of ground situate on the east side of Pied Bull Yard in the said parish of St. George, Bloomsbury, in the said county of Middlesex, with the warehouse thereon erected being in the rear of the messuage or tenement being No. 13 Bloomsbury Square."

The lease contained a covenant by the lessee "that no new erection or building . . . . shall at any time during the said term be erected in or under or over any part of the premises hereby demised without the consent in writing of the said Duke or the said trustees their heirs or assigns or his or their steward or agent for the time being," and also a covenant "that the premises hereby demised shall not at any time during the said term be converted into or occupied as chambers or as or for a school, seminary or college of any kind, or as or for a madhouse, billiard room or public concert, music or ball room, shooting gallery, or as or for a brothel, or as or for a foundry, hospital, infirmary, dispensary, public office or institution of any kind, or as or for a house or shop for the sale of coals, potatoes, herbs, roots, vegetables, tobacco, wines, spirits, ale, beer or cooked provisions of any kind without such consent as aforesaid." The lease contained

a forfeiture clause in the event of the breach, neglect, non-performance or non-observance of any of the covenants contained therein.

The lease also contained a proviso "that the reception of rent on the part of the said Duke or of the said trustees their heirs or assigns or their steward or agent shall not be and shall not be construed to mean a waiver of any of the covenants on the part of the said lessee hereby agreed to be performed or of the penalty attached to the non-performance thereof."

Before 1913 the lessee's interest became vested in W. Abbott and A. S. Rushton, who by sub-lease dated November 17, 1913, sublet the premises to the defendant, Mills, under the description of "All that piece of ground situate on the east side of Pied Bull Yard in the parish of St. George, Bloomsbury, in the county of Middlesex, with the coach-house and stable erected thereon which said described premises are now known as No. 6 Galen Place, Bloomsbury." The sub-lease contained a covenant by the defendant that "no sale by auction shall be permitted to happen or occur upon the said demised premises nor shall the same be assigned sub-demised or underlet to any person or persons whatsoever without [the consent in writing of the lessors or their agents for the time being] and that the premises hereby demised or any part thereof shall not at any time during the said term be used or occupied as and for a school of any kind or madhouse, billiard room," continuing in the same terms as in the head lease. The sub-lease was for a period expiring on December 22, 1923.

No evidence was given at the trial showing how or when the premises had been converted from a warehouse into a coachhouse and stable, but it appeared that in Messrs. Abbott and Rushton's time, before the sub-lease to the defendant, the premises had been used as a coachhouse and stable with living rooms for the coachman on the upper floor.

The defendant Mills converted the premises into a garage with living rooms over, the living rooms having a separate and independent entrance, and occupied them by keeping

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cars in the garage and by his chauffeur using the living rooms not as tenant but as servant.

On September 1, 1922, the defendant ceased to occupy the living rooms by his chauffeur and let them to one Wilmore at a rent of 6*l.* 5*s.* per month, but continued in occupation of the garage. Under the agreement the premises let to Wilmore were to be used as a private dwelling-house only. The defendant's lease expired on December 22, 1923, and the head lease vested in Abbott and Rushton expired on December 25, 1923.

On July 31, 1924, the freeholders leased the premises to the plaintiff, and it was conceded that as regards the right to possession the plaintiff stood in the shoes of the freeholders.

The plaintiff by his particulars of claim in the county court claimed possession of the whole of the premises and mesne profits; alternatively he claimed possession of the ground floor of the said premises.

The defendant in answer to the claim relied upon s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. (1)

The deputy county court judge gave judgment for the defendant on the ground that the premises in question constituted a dwelling-house to which the Rent Restriction Acts applied; that the defendant was lawfully in possession;

(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 1: "No order or judgment for the recovery of possession of any dwelling-house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless—

(*a*) any rent lawfully due from the tenant has not been paid, or any other obligation of the tenancy (whether under the contract of tenancy or under this Act) so far as the same is consistent with the provisions of this Act has been broken or not performed."

Sect. 12, sub-s. 2: "This Act shall apply to a house or a part of a house let as a separate dwelling, where either the annual amount of the standard rent or the rateable value does not exceed . . . . and every such house or part of a house shall be deemed to be a dwelling-house to which this Act applies: Provided that—

. . . . .

(ii.) the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes."

that if there had been any breaches of covenant they had been waived; that if such breaches of covenant had not been waived he gave relief under the Conveyancing Act against the breach, and in any event he exercised his discretion under the Rent Restriction Acts in favour of the defendant.

Norman Birkett K.C. and *J. A. Stainton* for the plaintiff. The decision of the deputy county court judge was wrong. The defendant is not in occupation of any part of the premises in question as a dwelling-house, and therefore the Rent Restriction Acts have no application. The living rooms above the garage, to which the Acts do apply, are quite separate and distinct from the garage, and are let to Wilmore; the defendant only retains possession of the garage. *Hicks* v. *Scarsdale Brewery Co.* (1) shows that in order that a defendant may claim the protection of the Rent Restriction Acts he must be in actual possession of the premises as a dwelling-house. It is clear from ss. 5 and 15 of the Act of 1920 that the possession referred to in the Act must mean actual physical possession. The judgment of Bankes L.J. in *Keeves* v. *Dean* (2) supports the view that a statutory tenant loses his right not to have an order for possession made against him as soon as he ceases to retain possession: see also *Aston* v. *Smith.* (3)

These premises, having been originally let as a warehouse, did not become a dwelling-house within the meaning of the Rent Restriction Acts merely because the tenant chose to use them as such. Bankes L.J. said in *Epsom Grand Stand Association* v. *Clarke* (4) that "if an agreement were to let premises as a barn, the tenant, even though he lived there, could not be heard to say they were let as a dwelling-house." There was no letting to the defendant of a dwelling-house on which he can rely. *Callaghan* v. *Bristowe* (5) is distinguishable, because there a garage and living rooms over the garage, which were occupied by the defendant's chauffeur, were let to the defendant, and the county court judge found

(1) [1924] W. N. 189.
(2) [1924] 1 K. B. 685, 690.
(3) [1924] 2 K. B. 143, 146.
(4) [1919] W. N. 170, 171.
(5) (1920) 123 L. T. 622.

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that the defendant was the tenant of the rooms as a separate dwelling, and that therefore he was entitled to rely upon the protection of the Act.

There has been a breach by the defendant of the covenant in the head lease of 1865, that the premises should not be converted into or occupied as chambers. In 1865 "chambers" meant residential flats. The defendant has done that which the lease prohibited by converting the rooms above the garage into a separate flat, which is let to Wilmore, and occupied by him and his family. As that covenant has been broken the defendant cannot under s. 5, sub-s. 1 (*a*), rely upon the Rent Restriction Act as a defence to the claim for possession: *Chapman* v. *Hughes*. (1) The county court judge gave relief under the Conveyancing Act, 1882, against the forfeiture, but inasmuch as the lease had already expired he could not give relief under that Act. He also purported to exercise his discretion under the Act of 1920 in favour of the defendant, but there was no evidence upon which he could exercise his discretion in the way he did.

The plaintiff is entitled to an order for possession of the whole of the premises, but in the alternative he is entitled to an order for possession of the garage as distinct from the living rooms above it. The garage of which the defendant is in possession is quite separate and distinct from the living rooms above, and the structural alterations necessary to make them so were made by the defendant himself. As the garage is now entirely separated from the dwelling-house it is outside the protection of the Rent Restriction Act.

[GREER J. At common law you could not recover possession of part of the premises let.]

The Rent Restriction Acts have created an artificial state of affairs. Apart from those acts on the expiration of a lease possession of the premises could be obtained as a matter of course. Now the Rent Restriction Act prevents that being done, but a person who relies upon the Act must comply with the conditions in s. 5. In considering whether a plaintiff is entitled to possession of the premises it is not enough to

(1) (1923) 39 Times L. R. 260.

look at the terms of the original letting; it is necessary to look at the status of the premises at the time the claim for possession is made: *Prout* v. *Hunter*. (1) Here the premises have been divided by the defendant, the living rooms having been sublet while the garage has been retained in his own occupation.

[GREER J. Does not the second paragraph of the proviso to sub-s. 2 of s. 12 of the Act of 1920 prevent the plaintiff from recovering possession?]

That proviso is confined to the cases to which it has been strictly restricted.

Hon. Sir Malcolm Macnaghten K.C. and *Humfrey Edmunds* for the defendant. The premises in question were let to the defendant as a dwelling-house. The finding of the county court judge is conclusive on this point, and therefore they are premises to which the Rent Restriction Acts apply. The fact that part of the premises were used as a coachhouse or as a garage does not prevent the whole of the premises being a dwelling-house: *Callaghan* v. *Bristowe*. (2) If Abbott and Rushton had demanded possession of the premises from the defendant on December 19, 1923, and if he had been occupying the living rooms above the garage it is conceded by the plaintiff that the Rent Restriction Act would have applied and the landlords could not have obtained possession. The fact that the defendant, instead of occupying the rooms himself, occupies them through a tenant to whom he has lawfully sublet them cannot make any difference. The defendant is the person who is really in possession of the whole of the premises. In recovering possession of a house the action for possession is brought against the person who is actually in possession, but it is not necessary in order to entitle a person to rely upon the Rent Restriction Act that he should be in actual possession of the premises. Where premises have been let as a dwelling-house and the tenant afterwards separates a part of the premises and lets that part as a new dwelling-house retaining the remainder in his own possession, the Act does not give the landlord power to recover possession

(1) [1924] 2 K. B. 365, 736. (2) 123 L. T. 622.

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of the premises. The Act says that no order to recover possession of premises within the Act shall be made, and as the premises were originally let as a dwelling-house the fact that part of the premises have been cut off from the dwelling-house does not entitle the landlord to recover possession of the premises. The head lease did not contain a covenant forbidding the conversion of the warehouse into a coachhouse or garage. The object of the covenant relied upon by the plaintiff was not to prevent the warehouse from being used for residential purposes, but to prevent the premises from being used for certain specified purposes.

[GREER J. Were these premises ever let by the Duke of Bedford as a dwelling-house ?]

The premises were let for a term of sixty years to be used for purposes which were sufficiently wide to enable them to be used as a dwelling-house, except in connection with those purposes specifically enumerated. The premises were let without a restriction that they should not be so used, and therefore it must be assumed that they could be used as a dwelling-house by the tenant during the term. The contract of tenancy referred to in s. 5, sub-s. 1 (*a*), of the Act of 1920 means the contract of tenancy of the tenant who is claiming the protection of the Act and not the contract of tenancy of the original tenant or of any intervening tenant. It is not suggested that there has been a breach of any of the covenants in the defendant's lease. In *Chapman* v. *Hughes* (1) the letting to the person claiming the protection of the Act was in itself a breach of the covenant which the lessor had entered into with his superior lessor. In the present case the lease to the defendant was not a breach of the head lease. The covenant not to use the premises as chambers is a very ambiguous one. The user of the premises as a dwelling-house has continued for more than ten years, and the Duke of Bedford's agent must have been aware of such user. Having regard to the length of time during which such user has been going on the Court ought to presume that the written consent of the lessors had been given for such conversion and user.

(1) 39 Times L. R. 260.

Assuming that the conversion of the warehouse into a coach-house with living rooms over was a breach of covenant the county court judge was right in exercising his discretion in favour of the defendant, and this Court cannot interfere with his decision in that respect.

Norman Birkett K.C. in reply. The material time to be taken into consideration is the time when the matter came before the Court. At that time the defendant was not in possession of any part of the premises to which the term "dwelling-house" can be applied, and therefore he was not entitled to the protection of the Rent Restriction Act. The defendant could let the garage, which is the only portion of the premises in his possession, at any rent he liked to ask, and therefore he cannot rely upon the Act. The garage is not a dwelling-house, and the defendant is not in possession of a dwelling-house. The plaintiff is entitled as against the defendant to an order for possession of the whole of the premises, but it does not follow if an order for possession of the whole of the premises is made against the defendant that the plaintiff would be able to enforce it as against the sub-tenant, who is in possession of the living rooms above the garage. On the meaning of "chambers" he referred to the Oxford English Dictionary, the Standard Dictionary, the Century Dictionary and *Rider* v. *Rollit*. (1)

Cur. adv. vult.

July 31. SALTER J. read the following judgment: I have had the advantage of reading the judgment of Greer J. in this case, and I need not repeat the facts. I agree with the observations he makes as to the order or judgment for the recovery of possession. I agree, also, that the conversion of the upper part of the warehouse into living rooms (if such conversion ever took place) and their use as living rooms were not breaches of the covenant of the lease of 1865.

The case turns on s. 12, sub-s. 2, and s. 5, sub-s. 1, of the Rent Restriction Act of 1920. The question is whether the

(1) (1920) 36 Times L. R. 687.

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demised premises as a whole are "a house let as a separate dwelling," and, if not, whether any part of the premises is "a part of a house let as a separate dwelling." As regards the premises as a whole, I think there was no evidence on which the learned judge could find, if he did find, that they were "let as a dwelling." The warehouse, or the stable, or the garage was never, as a whole, let as a dwelling or used as a dwelling. The facts are very different from those in *Callaghan* v. *Bristowe*. (1) I therefore consider the two parts separately, and the upper part first.

Where premises are let to a tenant on such terms that he is free to use them as a dwelling-house, or not, as he pleases, it is impossible to say from the terms of the tenancy whether the premises are "let as a dwelling," or not. In such a case regard must be had to the user which is being made of the premises by the tenant or sub-tenant then in occupation at the time when possession is sought to be obtained. If they are being used as a dwelling they are "let as a dwelling," and no order in ejectment can be made except in circumstances which do not exist here. It must, I think, be added by way of qualification that the user as a dwelling must not be a breach of any contract on which the plaintiff in ejectment is entitled to rely. A tenant cannot deprive his landlord of his common law rights by breaking the contract of tenancy. Further, the occupier at the time when possession is sought must be a person entitled to the protection of the Act. The prohibition in s. 5, sub-s. 1, is against the ejectment of a tenant (that is, of a former tenant holding over), not against the ejectment of a mere trespasser. The occupier claiming the protection of the Act must be a former tenant or sub-tenant holding over or his successor under s.12, sub-s. 1 (*g*). In this case the subletting of the upper part as a dwelling was no breach of either of the leases, and Wilmore is a former sub-tenant holding over. Moreover, Wilmore's tenancy agreement expressly provides that the upper part demised to him shall be used as a private dwelling-house only. Therefore, whether regard is had to the head lease or to the under lease

(1) 123 L. T. 622.

or to Wilmore's agreement, and whether to the terms of the letting or to the use made of the premises let, the upper part of these premises is found to be "a part of a house let as a separate dwelling," and an order of ejectment in respect of it is forbidden.

As regards the garage alone, that has never been let as a separate dwelling, and has never been, and is not, so used. As to this part, therefore, the plaintiff is entitled to his common law rights.

The appeal succeeds, and the judgment for the defendant must be set aside, and judgment entered for the plaintiff on his alternative claim for possession of the garage alone.

GREER J. read the following judgment: This is an appeal from the judgment of the deputy judge of the Bloomsbury County Court dismissing with costs an action for possession of certain premises consisting of a garage with living rooms above, known as No. 6 Galen Place, Bloomsbury. [His Lordship stated the facts set out above and continued:] It is evident that after the defendant's lease expired on December 22, 1923, and the head lease vested in Abbott and Rushton expired on December 25, 1923, both the defendant and Wilmore would, apart from the Rent Restriction Acts, have become trespassers, against whom an order for possession could not be refused.

The county court judge decided in favour of the defendant on the ground that the premises in question constituted a dwelling-house to which the Rent Restriction Acts applied, that the defendant was lawfully in possession, that breaches of covenant, if any, had been waived, that if such breaches of covenant had not been waived he gave relief under the Conveyancing Act, and in any event he exercised his discretion under the Rent Restriction Act in favour of the defendant.

In my judgment the learned county court judge was right in refusing to give judgment for possession of the living rooms, but wrong in refusing to give judgment for possession of the garage.

It was argued by Mr. Birkett for the appellant that,

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inasmuch as the defendant was not in possession of any part of the premises as a dwelling-house, he could not claim the benefit of the Rent Restriction Acts, and therefore there must be judgment for the plaintiff as against the defendant, whether Wilmore was entitled to remain in possession of the living rooms or not, and he relied on the judgment of Swift J. in *Hicks* v. *Scarsdale Brewery Co.* (1) In that case the plaintiff sued for possession of a dwelling-house which he had let to a man named Armstrong, and the defendants had, by assignment, become entitled to the lease. They sublet to Sleight, who lived on the premises. The defendants never themselves occupied. It was admitted that the occupier was protected by the Rent Restriction Acts and could not be ejected. The county court judge made an order for possession against the defendants. On appeal Swift J. held that he was right, because the Rent Restriction Acts were intended to protect the tenant in occupation, and that a tenant not himself in occupation whose term has expired could not take advantage of the Acts. Acton J. thought that the express words of the Act prohibited the judge from making an order for possession. No point had been made in the county court about the nature of the action for possession. It seems to me that the action for possession is an action for an award of actual possession, and a judgment of possession is binding on the persons in fact in possession, and if judgment for possession is given the bailiff of the county court in executing the judgment must take physical possession, and turn out whoever may be on the premises, unless they are occupied by a sub-tenant entitled to the protection of s. 5 of the Rent Restriction Act, 1920, as amended by the Act of 1923. It is impossible to read s. 138 of the County Courts Act, 1888, without seeing that an action for possession under that Act is an action for physical possession. The action may be brought against the persons actually in possession or it may be brought against the tenant. Whoever may be selected as defendant it is an action, not for a declaration of right to the rents and profits, but for possession of the land itself. And

(1) [1924] W. N. 189.

if there is a statute which prohibits an order for possession, this is a complete answer to the action for possession, notwithstanding the fact that the obstacle to an order does not arise out of the defendants' rights but out of the privileged position of the person in actual occupation.

In my opinion the first point made for the appellant fails, so far as it is concerned with an order for possession of the whole premises. I agree with Swift J. that a tenant who has sublet the whole of the premises let to him is outside the protection of the Act, but I do not think a judgment for possession can be given as long as the premises are in the occupation of any person who is entitled by the Act to remain in occupation.

The appellant's second point was that there had been a breach of a term of the agreement of tenancy in that the premises were being used as "chambers." Clauses of forfeiture are to be construed strictly, and, having regard to the rest of the restrictive clause, I think it would be wrong to construe the word as meaning residential chambers. The prohibition of use as a madhouse or as a brothel seems to indicate that it was contemplated as permissible for people to live on the premises provided they were neither mad nor habitually unchaste. I do not think the letting of the rooms for residential purposes was a breach of the terms of the lease.

It is unnecessary to deal with the further questions of waiver or reasonableness, but it remains for me to consider the difficult question whether the judge was wrong in refusing to make an order for possession of the garage only. Proviso (ii.) to sub-s. 2 of s. 12 of the Act of 1920 provides that "the application of this Act to any house or part of a house shall not be excluded by reason only that part of the premises is used as a shop or office or for business, trade, or professional purposes." It seems to me that this proviso must be construed distributively so as to mean that where a house is let as a dwelling-house, so as to make the statute apply to it, then the fact that part of the house is used as a shop, etc., will not take it out of the Act, and that where

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part of a house is so let then the fact that a portion of the part so let is used as a shop, etc., will not take the part so let out of the Act, but it does not mean that where part of the house is let separately as a dwelling-house and part is let separately for business premises, the Act applies to the whole house. It has been decided, and I think rightly, that where the landlord or owner gets possession of a house which was a dwelling-house within the Act, and himself by separate lettings divides it into rooms let as a dwelling-house and rooms let by separate agreement as business premises, the Act no longer applies to the business premises : see *Phillips* v. *Hallahan*. (1) In the present case neither the landlord nor his immediate lessee has made any separate letting of different parts of the premises in question, but the defendant himself has separately let the upper portion of the premises as a dwelling-house, and is continuing to use the ground floor himself as a garage. It was decided in *Prout* v. *Hunter* (2) that if a lessee sublets the premises for purposes other than those which are protected by the Act he thereby changes the status of the premises, and the Act ceases to apply to them. In that case the plaintiff let an unfurnished flat to a tenant who furnished the flat and sublet it to the defendant. The Court held that the flat had lost the status it had under the tenancy agreement between the plaintiff and his tenant; it had become a furnished flat, and the Act no longer applied to it. It seems to me to follow from this that in order to ascertain whether the premises are a dwelling-house to which the Act applies, the Court must look at the status of the premises at the time the action for possession is brought, and not merely to the terms of the lease or agreement of tenancy granted or made by the plaintiff. If the defendant had let the garage to another person as a garage, the garage would, on the authority of *Prout* v. *Hunter* (2) and *Phillips* v. *Hallahan* (1), be outside the Act. Does it make any difference that he has not separately let the garage but is using it as a garage himself ? I think not. It seems to me that where a house is let on terms which admit of its user as business

(1) [1925] 1 K. B. 756. (2) [1924] 2 K. B. 365, 736.

premises or as a dwelling-house, and at the time the action is brought it is being used by the defendant solely for business purposes, the house is then not within the definition of a dwelling-house to which the Act applies. It is not then "let" or, looking at it from the opposite angle, "tenanted" as a dwelling-house. I can see no other way in which the Act can be applied to houses let without any prohibition as to user, so that they may be used in any lawful way, than by holding that user at the time the claim to possession is made must determine the question whether the Act applies to them or not. The proviso to sub-s. 2 of s. 12 seems to show that, except as therein provided, user may be the determining factor in deciding whether the Act does or does not apply to premises.

In my judgment by dividing the premises into two parts, one let as a dwelling-house, and the other retained for his own use as a garage, the defendant has lost the protection of the Act so far as the garage is concerned.

The action is a common law action for possession of the whole of the premises. The defendant is entitled to say to the Court that s. 5 prohibits an order for possession of the living rooms, inasmuch as his tenant was lawfully in possession of those rooms when the lease came to an end, but cannot rely on the section as an answer to the plaintiff's claim for possession of the garage.

I think the appeal should be allowed and judgment given for possession of the garage.

Appeal allowed.

Solicitors for plaintiff: *Stanley Evans & Co.*
Solicitors for defendant: *Mills & Morley.*

R. F. S.

C. A.
1925
July 1, 2, 13.

[IN THE COURT OF APPEAL.]

INGLE *v.* FARRAND.

Revenue—Income Tax on Offices, Employments and Pensions—Second Class Clerk in Employ of London County Council—Assessment under Sch. E or Sch. D—Additional Assessment under Sch. E—Finance Act, 1922 (12 & 13 *Geo.* 5, *c.* 17), *s.* 18—*Income Tax Act*, 1918 (8 & 9 *Geo.* 5, *c.* 40), *s.* 125.

The respondent, a clerk in the employment of the London County Council, was assessed for income tax for the year 1921–22 under Sch. E in respect of "salaries, fees, wages, perquisites or profits." If he had been assessed under Sch. D, as at that time he should have been, his income for the year in question would have been 100*l.* less than that upon which he had been wrongly assessed and overcharged. He did not appeal against that assessment, which became binding on him. In September, 1922, a further assessment under Sch. E was made upon him in respect of a sum of 77*l.*, representing bonus in the year in question. Against this further assessment he appealed. The Commissioners confirmed the assessment, but Rowlatt J. allowed the appeal from them:—

Held, reversing the decision of Rowlatt J., that the further assessment was an assessment within the meaning of sub-s. 6 of s. 18 of the Finance Act, 1922, and that, as it was made after May 1, 1922, it fell within s. 18, and had been rightly made under Sch. E.

APPEAL from a decision of Rowlatt J. allowing an appeal from the Commissioners, who had confirmed an additional assessment for income tax upon the respondent for the year 1921–22. The respondent was an assistant of the second class employed by the London County Council, and was assessed for the financial years 1918–19, 1919–20, and 1920–21 successively under Sch. E "in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment." In the year 1921–22 he was also charged upon a first assessment in that year in respect of his office or employment under Sch. E in the sum of 359*l.* If the respondent had been assessed upon the average system under Sch. D his income for 1921–2 would have been 259*l.* instead of 359*l.* He did not appeal against that assessment, and duly paid income tax on 359*l.* The respondent's remuneration for the last mentioned year was in fact composed of a sum of 194*l.* 7*s.* 3*d.* for substantive salary, and a bonus of 241*l.* 19*s.* 2*d.*, making together 436*l.* 6*s.* 5*d.* Accordingly on September 13, 1922, an additional assessment was made upon him in the

sum of 77*l*. On his appeal from that assessment the Commissioners determined that for the year in question the respondent did not occupy a public office within Sch. E and confirmed the additional assessment, but Rowlatt J. allowed the appeal from them.

The Crown appealed. The appeal was heard on July 1 and 2, 1925.

R. P. Hills (*Sir Douglas Hogg A.-G.* with him) for the Crown. The respondent never appealed against the first assessment upon him for the year in question under Sch. E, and that assessment is binding upon him.

Great Western Ry. Co. v. *Bater* (1) raised a doubt as to the nature of employment in cases like this, and s. 18 of the Finance Act, 1922, was passed to remove that doubt; sub-s. 6 of that section only applies to that class of persons who in practice had always been assessed under Sch. E. The law is now changed, and the surveyor is now bound to assess the respondent under Sch. E. The respondent contends that after discovering the mistake the surveyor should have proceeded under Sch. D, but that is not so, for sub-s. 6 of s. 18 of the Finance Act, 1922, provides that to any assessment to income tax which is made or becomes final after May 1, 1922, Sch. E is to apply, and this additional assessment was made in September, 1922. The assessment therefore cannot be made under Sch. D. The surveyor applied the only rules he could apply.

Cave K.C. and *Ridsdale* for the respondent. The contention of the Crown is that although the respondent has for many years paid tax for which he was not liable, it can now under s. 18 mulct him still further; and that that is the indirect result of *Bater's* case. (1) We contend that the respondent comes within the decision in *Bater's* case (1), and that his assessment should have been made under Sch. D; and, further, that inasmuch as this was not a proper assessment, he has in fact been overcharged and cannot have an additional assessment made upon him.

(1) [1922] 2 A. C. 1.

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The Commissioners assumed that there was nothing but the Act of 1922 which entitled them to make a further assessment. But an additional assessment can only be made under s. 125 of the Income Tax Act, 1918, and according to that the surveyor must discover that there has been an undercharge; but the respondent was not chargeable by law: *Bater's* case (1), and if he comes under Sch. D, and not under Sch. E, he has not been undercharged, and there is no right to make an additional assessment upon him. Sub-s. 6 of s. 18 was meant to give a retrospective effect to that section, but even then that does not get rid of this assessment, which still remains illegal and improper, because it became binding before May 1, 1922. There is nothing in s. 18 of the Act of 1922 which gives any further power to make an additional assessment than s. 125 of the Act of 1918 gave. "Any assessment" in sub-s. 6 does not cover an additional assessment. "Assessment" and "additional assessment" are distinct terms used throughout the Acts: compare Income Tax Act, 1918, Part VI., and s. 29 of the Finance Act, 1923. In this case the original assessment was improper, and having been made before May 1, 1922, it was "final and conclusive": *Allen* v. *Sharp* (2), and does not come within s. 18 of the Act of 1922. The Courts treat with great jealousy the retrospective effect of taxing Acts: *Lauri* v. *Renad* (3); *Lumsden* v. *Inland Revenue Commissioners* (4); *Sharp Brothers & Knight* v. *Chant.* (5)

Hills in reply. Sub-ss. 1 and 6 of s. 18 plainly involve an additional charge; there has been an alteration in the law, and Sch. D no longer applies to a case like this.

Cur. adv. vult.

July 13. POLLOCK M.R. This is an appeal by the Crown against the judgment of Rowlatt J. dated March 17, 1925, who allowed an appeal from the decision of the Commissioners,

(1) [1922] 2 A. C. 1.
(2) (1848) 2 Ex. 352.
(3) [1892] 3 Ch. 402, 421.
(4) [1914] A. C. 877, 896–7.
(5) [1917] 1 K. B. 771, 778.

who had confirmed an additional assessment for income tax upon Mr. Ingle for the year 1921–22. Mr. Ingle (hereinafter referred to as "the respondent") was an assistant of the second class employed by the London County Council, and was assessed for the financial years 1918–19, 1919–20, 1920–21, successively under Sch. E, that is, "in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment." In the year 1921–22 he was also charged upon a first assessment in that year in respect of his office or employment under Sch. E in the sum of 359*l.* No appeal was made against that assessment, and income tax on that sum was duly paid. It now appears that in that year the respondent's remuneration was composed of a sum of 194*l.* 7*s.* 3*d.* for his substantive salary, and also of a bonus of 241*l.* 19*s.* 2*d.*, making together 436*l.* 6*s.* 5*d.* Accordingly, an additional assessment was made upon him in the sum of 77*l.*, being the difference between the sum of 359*l.* on which he had paid under the first assessment and the sum of his total emolument, 436*l.* 6*s.* 5*d.*

It is against this additional assessment, which was confirmed on appeal by the Commissioners, that the respondent successfully appealed to Rowlatt J., and the question we have to determine is whether that additional assessment is rightly made upon him, or whether he has already satisfied all proper claims for income tax upon him by reason of the fact that he ought to have been assessed under Sch. D upon the average of his wages or profits for the three preceding years, which in 1921–22 would amount to a less sum than that of 359*l.*, on which he has already paid tax.

The practice which obtained until on March 13, 1922, the case of the *Great Western Ry. Co.* v. *Bater* (1) was decided by the House of Lords, of assessing under Sch. E those who hold any employment of a continuous or permanent nature under a public company, was altered by that decision. No precise tests were laid down in it to determine what persons ought or ought not to be so assessed: the question was left as one of fact and degree, although the House determined

(1) [1922] 2 A. C. 1.

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that the clerk whose salary had raised the question in that case was not the holder of a public office or employment of a public nature within Sch. E. In the present case the Commissioners have determined upon the evidence before them, which was sufficient for their consideration, that the respondent did not during the year of assessment 1921–22 occupy a public office or public employment of profit within the meaning of Sch. E of the Income Tax Act, 1918.

Upon this finding, therefore, the respondent would appear to have solid ground for his contention that the additional assessment upon him in respect of the 77*l.* under Sch. E ought not to be made, if he falls to be assessed under Sch. D, with the arithmetical result already stated.

It is now necessary to consider the meaning and effect of s. 18 of the Finance Act, 1922, which was passed to overcome the difficulties created by the decision in *Bater's* case (1), difficulties which were foreshadowed in his speech by Lord Sumner. By sub-s. 1: "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D . . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that schedule shall apply accordingly subject to the provisions of this Act." Thus, in spite of the finding of the Commissioners, were an assessment made upon the respondent when that section is operative he would be chargeable under Sch. E.

By sub-s. 6 the provisions of sub-s. 1 "shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income tax which is made or becomes final and conclusive after the first day of May, nineteen hundred and twenty-two, in respect of any employment (other than that of a weekly wage earner employed by way of manual labour) under any public department, or under any company, society or body of persons or other employer mentioned in Rule 6 of the Rules applicable to Schedule E." The additional assessment was made on September 13, 1922,

(1) [1922] 2 A. C. 1, 30.

so that if the words "any assessment" used above include an additional assessment, s. 18 applies to it, and the schedule applicable is E.

Additional assessments are made under the powers conferred by s. 125 of the Income Tax Act. Where a person has been undercharged in the first assessment, then upon compliance with the conditions laid down in the section, an additional first assessment may be made upon him, and the additional first assessment is subject to appeal and other proceedings, as in the case of a first assessment. I see no reason to differentiate these assessments; and herein I agree with the conclusion of Rowlatt J. Both are assessments, and are in my judgment included in and covered by the words "any assessment" in s. 18, sub-s. 6. If so, the additional assessment upon the respondent was rightly made under Sch. E. Further, no appeal was taken from the first assessment under Sch. E. It became final and conclusive, although not subsequently to May 1, 1922. If the whole matter were reopened and a new assessment made, Sch. E applies.

It is argued that the opening words of s. 125 of the Act of 1918 were not complied with, because the surveyor ought to have discovered that the first assessment had been wrongly made under Sch. E, and that if he had applied the average system under Sch. D as ought to have been done at the time of the first assessment, no discovery of an undercharge could have been made. I do not accept this argument.

The surveyor is not required to form an opinion, which is later held by the Courts to be the correct view, before he takes action. There must be information before him which would enable him, acting honestly, to come to the conclusion that a state of facts exists requiring him to take action: see *Rex* v. *Bloomsbury Income Tax Commissioners* (1), following *Rex* v. *Kensington Income Tax Commissioners.* (2) In the present case there appears to me to have been abundant cause and reason for him to proceed under s. 125. Then s. 18, sub-s. 6, says in terms that "for the purpose of any assessment to income tax which is made or becomes final and

(1) [1915] 3 K. B. 768. (2) [1913] 3 K. B. 870.

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conclusive after 1st May, 1922," as this additional assessment does, "the provisions of sub-s. 1, which introduce Sch. E once more, are to have and be deemed always to have had effect." Hence at the moment when this additional assessment comes up for consideration, Sch. E with its assessment upon actual profits governs the case, and in order to see if it has been rightly made, for that purpose, s. 18, sub-s. 1, is to have effect and to be deemed always to have had effect. Thus there has been nothing wrong in the procedure adopted, or in the standard applied to this additional assessment, and in my judgment it stands good.

The Commissioners have found that the bonus received by the respondent was not "perquisites" within r. 4 of Sch. E, a rule which it may be mentioned has been repealed in the third schedule of the Finance Act, 1922, and no point upon this finding was taken before us. The appeal must be allowed with costs here and below and the additional assessment confirmed.

WARRINGTON L.J. The question in this appeal is whether an additional assessment in the sum of 77*l.* made upon September 13, 1922, in respect of the respondent's profits for the year of assessment 1921–22 from his employment under the London County Council, was legally made upon him. The Commissioners decided that it was so made and dismissed his appeal. Rowlatt J. on the other hand has reversed the decision of the Commissioners and discharged the assessment.

The decision turns upon the true construction and effect of s. 18 of the Finance Act, 1922, and particularly of sub-ss. 1 and 6. This section was introduced into the Act in consequence of the decision of the House of Lords in March, 1922, in *Great Western Ry. Co.* v. *Bater* (1), in which it was held that an employee of the railway company was not the holder of a public office or employment of profit within the meaning of r. 6 of Sch. E to the Income Tax Act, 1918, and was therefore to be assessed under Sch. D and not under Sch. E, under which he had been in fact assessed.

(1) [1922] 2 A. C. 1.

The distinction between the two schedules for the present purpose is that under Sch. D the tax for the year of assessment is computed upon an average of the three preceding years, whereas under Sch. E it is computed on the actual profits in the year of assessment.

The two sub-sections on which the question turns, so far as they are material, are as follows: Sub-s. 1 of s. 18 says: "Such profits or gains arising or accruing to any person from an office, employment or pension as are, under the Income Tax Act, 1918, chargeable to income tax under Schedule D . . . . shall cease to be chargeable under that schedule and shall be chargeable to tax under Schedule E, and the Rules applicable to that schedule shall apply accordingly subject to the provisions of this Act," and sub-s. 6: "The provisions of sub-section 1 . . . . of this section shall have effect and shall be deemed always to have had effect, for the purpose of any assessment to income tax which is made or becomes final and conclusive after the first day of May, nineteen hundred and twenty-two, in respect of any employment . . . . under any public department, or under any company, society or body of persons or other employer mentioned in Rule 6 of the Rules applicable to Schedule E."

The respondent was at the material time in the employment of the London County Council. It is unnecessary to mention the nature of his employment, for the Commissioners have found that he did not during the year 1921–22 occupy a public office or public employment of profit within the meaning of Sch. E of the Income Tax Act, 1918. This finding of the Commissioners was not seriously challenged by the Attorney-General, and Rowlatt J. decided the case on the assumption that it was correct, and we must do so likewise. The result is that under the authority of *Great Western Ry. Co.* v. *Bater* (1) the respondent was liable to be assessed under Sch. D and not under Sch. E. In fact he was assessed under Sch. E in accordance with the practice of the Commissioners in such cases prior to the decision in *Bater's* case. (1) The assessment

(1) [1922] 2 A. C. 1.

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for the year 1921–22 was the sum of 359*l.* If it had been made under Sch. D it would have been 259*l.* only or 100*l.* less. However the respondent did not appeal, and in due course paid the tax.

The actual profits for the year in question, however, including bonuses, turned out to exceed 359*l.* by 77*l.*, and accordingly under s. 125 of the Income Tax Act, 1918, the surveyor, conceiving that he had discovered that profits chargeable to tax amounting to 77*l.* had been omitted from the first assessment, certified the particulars to the General Commissioners, who signed and allowed the additional assessment accordingly. This is the assessment appealed against, and it is clear that but for the Act of 1922 it would have been an illegal assessment. The man was liable to be assessed under Sch. D, under which the actual profits of the year of assessment are immaterial, and on this footing it was impossible to say that the 77*l.* had been omitted. On the contrary an assessment under Sch. D would have been on 259*l.* only, or 100*l.* less than the actual assessment. So also if sub-s. 6 had been omitted the result would have been the same, inasmuch as sub-s. 1 is clearly not retrospective.

But, though I confess to arriving at the conclusion with some regret, I can see no answer to the contention of the Crown, that the assessment can be supported under sub-s. 6. I will read the two sub-sections together, because they seem to me to be applicable to the respondent's case: "For the purpose of any assessment to income tax made after May 1, 1922, the profits or gains arising from the office or employment of the respondent shall be deemed to have been always chargeable under Sch. E, and the rules applicable to that schedule shall be deemed always to have applied accordingly."

The additional assessment of September 13, 1922, is an assessment to income tax, and it was made after May 1, 1922. I agree on this point with Rowlatt J. that it is impossible so to construe the sub-section as to confine its operation to original assessment.

Again the words "for the purpose of any assessment" seem to me to cover the determination of all questions affecting

the validity thereof. In the present case therefore the original assessment was made in accordance with what is to be deemed to have been the legal position at the time it was made, and, having been so made, the 77*l.* in question was omitted therefrom and the surveyor was entitled, and indeed bound, to certify the fact to the General Commissioners, who were themselves bound to sign and allow the additional assessment.

Unless, as the respondent asks us to do, we are at liberty to treat the original assessment as wrong and so find that, on the true legal footing, that of assessment under Sch. D, no additional assessment could have been made, the Crown must succeed, and I see no ground on which it is possible to come to such a conclusion. The Act in effect tells us that for the purpose of the additional assessment the original assessment must be deemed to have been in accordance with the law as altered by s. 18, sub-s. 1, and on this footing the 77*l.* was omitted therefrom, and I think that on this point the appeal of the Crown succeeds.

A subsidiary point was raised as to whether bonuses are to be included in the profits or gains. The Commissioners have found that they were part of the salary, and I see no sufficient ground for interfering with their finding. Even if they had been "perquisites" I think that under r. 4, s. 3, the result would have been the same.

The order appealed from should be reversed and the assessment restored with costs here and below.

ATKIN L.J. Mr. Ingle, the respondent, was in the year 1921–22, and had been for some years, a second class assistant in the employment of the London County Council. On October 6, 1921, he was assessed under Sch. E in respect of his office or employment in the sum of 359*l.* Notice of assessment was given to him on December 21, 1921. He made no appeal from such assessment, and in accordance with the Income Tax Act, 1918, s. 137, sub-s. 4, it "stood good." On March 13, 1922, in the House of Lords was decided the case of the *Great Western Ry. Co.* v. *Bater* (1), which determined

(1) [1922] 2 A. C. 1.

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that a clerk in a railway company, in similar position in material respects to the present respondent, was not the holder of a public office or employment of a public nature, and therefore could not be assessed under Sch. E, but had to be assessed under Sch. D. The assessment is under Sch. E on the income of the year of assessment, under Sch. D on the preceding three years' average. This case established that the assessment on the present respondent under Sch. E was wrong. It also disturbed what appears to have been the general practice of the Inland Revenue authorities to assess all salaried employees of all companies under Sch. E. But the Revenue authorities are not daunted by an adverse decision. They have a touch of Nature: "expellas furca tamen usque recurrent." They procured the insertion in the Finance Act of 1922 of s. 18, which not only confirmed for the future their former practice, but transferred all profits or gains from any office or employment from Sch. D to Sch. E. But in addition the section included sub-s. 6, which has been read. This sub-section clearly operates retrospectively, though to determine this case we must decide to what extent. It appears that the return made by the respondent and the assessment based upon the return were deficient by 77*l.* if computed in accordance with Sch. E. It is sufficient, indeed it is an overcharge, if computed on the three years' average under Sch. D. After the passing of the Finance Act, which received the royal assent on July 20, 1922, the authorities made an additional assessment on the respondent in the sum of 77*l.* on September 13, 1922. The power to do this is derived from s. 125, and depends upon whether the surveyor can be said to have discovered that the respondent had been undercharged in the first assessment. Now at the time the assessment was made it seems clear that he was not undercharged. He was not chargeable at all under Sch. E, and though he cannot dispute the propriety of the original assessment so far as his liability to pay tax on the amount contained therein is concerned, I see no kind of estoppel, statutory or otherwise, that prevents him disputing any additional assessment on any lawful ground he pleases, whether consistent

with the original assessment or not. But it is here that the retrospective operation of sub-s. 6 comes into play. It appears to me that the additional assessment is "any assessment," as mentioned in the sub-section. I think that this is plain from the words of the Income Tax Act: see in particular s. 136, sub-s. 1, and from the words of the Finance Act of 1922 itself: see s. 18, sub-s. 5, and s. 19. But "for the purpose of" the additional assessment the profits or gains of the respondent must be deemed always to have been chargeable under Sch. E. The additional assessment will not be valid, unless the respondent was chargeable originally under Sch. E; the investigation whether he was or not is, as I think, "for the purpose of" the additional assessment—to give or deny validity; and the section therefore operates to uphold the charge in question. There can be no doubt that employment under the London County Council is employment under a public corporation or local authority mentioned in r. 6, sub-r. 1, and we are not under the necessity of considering to what other companies, societies or bodies of persons the sub-section may relate. But in respect of all companies, etc., to which it does relate, I think that the sub-section was intended to have and has full retrospective effect, and was intended to give effect to the practice of the Revenue authorities in assessing the employees under Sch. E. I do not think it necessary to decide what would have been the case if the respondent had been in fact originally assessed under Sch. D. We are told that there may be some difficulty in making an additional assessment under a different schedule, though the difficulty is not to me at present apparent. But where, as in this case, the respondent was originally assessed, though wrongly, under Sch. E, and that assessment stands good, I see no difficulty in giving full retrospective effect to the sub-section so as to validate the additional assessment. I think, therefore, that this appeal should be allowed with costs.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Stanley & Co.*

R. M.

1925
July 21.

ELECTION PETITION FOR THE COUNTY COUNCIL OF THE ADMINISTRATIVE COUNTY OF CAMBRIDGE.

FORDHAM, PETITIONER *v.* WEBBER, RESPONDENT.

County Council—Election—Aldermen—Right to petition—Candidate—Nomination by Elector putting Name and Address of Person on Voting Paper—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 60, 77, 88 —*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 2.

By s. 88 of the Municipal Corporations Act, 1882: "An election petition may be presented . . . . by a person alleging himself to have been a candidate at the election."

By s. 77: "'Candidate' means a person elected, or having been nominated, or having declared himself a candidate for election, to a corporate office."

An election for the office of county aldermen took place at a meeting of a county council, and voting papers were signed and personally delivered to the respondent, who was chairman of the county council and of the meeting, and were openly produced and read by him. Amongst the voting papers was one containing a vote for the petitioner by writing his name and address on the voting paper, as a county alderman. Forty-four voting papers contained votes for the respondent as a county alderman. Neither the petitioner nor the respondent had before the election declared himself to be a candidate at the election of county aldermen. The respondent declared himself to be elected amongst others a county alderman, and the petitioner was not elected. The petitioner, alleging himself to have been a candidate at the election, presented a petition against the election of the respondent. The Municipal Corporations Act, 1882, contains no provision requiring the nomination of persons for the office of aldermen, and does contain a code of rules dealing with the nomination of candidates for the office of a councillor:—

Held, that the petitioner was not right in alleging himself to have been a candidate at the election for county aldermen, as he had not been elected and had not declared himself before the election as a candidate for election, and the writing by the voter of the petitioner's name and address on the voting paper did not amount to a nomination of him as candidate within s. 77, and that therefore he was not, under s. 88, entitled to present a petition for the purpose of questioning the election of the respondent.

SPECIAL CASE for the opinion of the Court stated under s. 93, sub-s. 7, of the Municipal Corporations Act, 1882.

1. The County Council of the Administrative County of Cambridge is a county council under the provisions of the Local Government Act, 1888, and the Acts incorporated

therewith, and March 14, 1925, was the day for the election of a chairman, and one-half of the county aldermen then went out of office and their places were to be filled by election pursuant to s. 14, sub-ss. 6 and 7, of the Municipal Corporations Act, 1882, and s. 2 of the Local Government Act, 1888.

2. At the said meeting of the County Council the first business was the election of a chairman. The respondent, M. F. V. J. A. Webber, was elected to be such chairman, and then accepted office and made and subscribed the required declaration, and thereupon became and was chairman of the said County Council.

3. The County Council next proceeded to elect the county aldermen. Voting papers were signed and personally delivered to the respondent as chairman of the County Council and of the meeting, who openly produced and read them or caused them to be read.

4. Amongst the voting papers so signed and personally delivered to the respondent as chairman of the County Council and of the meeting, and openly produced and read or caused to be read by him, was one containing a vote for the petitioner, Sir H. G. Fordham, Kt., amongst others as a county alderman of the County Council, by the voter writing the name and place of abode and description of the person for whom he voted upon the voting paper.

5. Amongst the voting papers so signed and personally delivered to the respondent as such chairman and so produced and read or caused to be read by him were forty-four containing votes for the respondent amongst others as a county alderman of the County Council. Until the first of such voting papers in favour of his election was read the respondent did not know that any person would vote or had voted for him.

6. Neither the petitioner, who was otherwise qualified to be a county alderman of the County Council, nor the respondent had, prior to the said voting papers being so delivered to the respondent and produced and read or caused to be read, declared himself to be a candidate at the said election of county aldermen.

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7. The respondent as chairman of the County Council and of the meeting declared himself to be elected amongst others a county alderman of the Council, and the petitioner was not elected.

9. On April 1, 1925, the petition in this case was filed praying that it might be determined that the respondent was not duly elected a county alderman and that his election was void. The petition alleged that the petitioner was a candidate at the election for the office of county alderman for the Cambridge County Council held on March 14, 1925, and that the respondent was incapable of being a candidate at the said election on the ground that he was the returning officer thereat, or was incapable of acting as returning officer thereat on the ground that he was a candidate thereat.

The questions for the opinion of the Court were :—

(1.) Whether upon the facts stated in paras. 4 and 6 of this case the petitioner was right in alleging himself to have been a candidate at the said election and entitled to present this petition.

(2.) Whether the respondent was disqualified for being elected a county alderman.

If the answer to the first or second question was in the negative the petition was to be dismissed.

If the answer to the first and second questions was in the affirmative the petition was to be allowed.

Willoughby Williams for the petitioner. The petitioner is entitled to present this petition, as he was a candidate at the election for county aldermen. Sect. 88 of the Municipal Corporations Act, 1882, provides that "an election petition may be presented . . . . by a person alleging himself to have been a candidate at the election." Under s. 2 of the Local Government Act, 1888, the council of a county and the members thereof are elected in the same manner as the council of a borough divided into wards, and therefore the provisions of the Municipal Corporations Act, 1882, apply to their election. The term "candidate" is defined in s. 77 of the Act of 1882 as meaning "a person elected, or having been nominated, or

having declared himself a candidate for election, to a corporate office." The election of aldermen is governed by s. 60 of the Act of 1882, sub-s. 4 of which provides that "every person entitled to vote may vote for any number of persons not exceeding the number of vacancies, by signing and personally delivering at the meeting to the chairman a voting paper containing the surnames and other names and places of abode and descriptions of the persons for whom he votes." The petitioner comes within the definition of "candidate" in s. 77 of the Act of 1882, because, although he was neither elected, nor had declared himself a candidate for election, yet he was a person who had been nominated by the voter writing his name and address on the voting paper. Lord Herschell in *Pritchard* v. *Bangor Corporation* (1) said: "Under the statute of 1835 the mayor and assessors presided at elections of councillors, and there was nothing in the nature of a nomination or preliminary proceeding prior to the day of election, but on the day of election every voter was entitled to vote for such person as he in effect at that time himself nominated, by means of delivering in a voting paper containing the name of the candidate for whom his vote was tendered." He was there dealing with conditions similar to those prevailing in the election of aldermen at the present time. That passage shows that a voting paper may be a nomination paper as well as a voting paper.

[BRANSON J. Under the Municipal Corporations Act, 1882, the candidates for election to certain offices are required to be nominated in writing, and the nomination papers must be duly signed. When the Act speaks of a candidate having been nominated, does it not mean that he has been nominated in the manner required by the Act?]

If that is so there can be no nomination for the office of county aldermen, because a previous nomination is not expressly required, but the submission is that the nomination of a candidate can take place in other ways than those mentioned in the Act. If the petitioner is not a candidate he

(1) (1888) 13 App. Cas. 241, 256.

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is subject to all kinds of penalties. A person whose name is on a voting paper is a candidate for that election.

[ACTON J. Must not the nomination be something that takes place antecedent to the election ?]

I submit not. A man who comes up for election has in effect been nominated. It is not necessary that a person should have assented to his nomination. If a person's name is put on a voting paper without his permission he is nevertheless a candidate within the meaning of the definition. Often a person is nominated and elected to a corporate office while he is abroad, in that case if he assents within a certain time the election is good. The proper construction of s. 88 of the Act of 1882 was discussed by Wright J. in *Harford* v. *Linskey*. (1) He said that "the words used seem designed to express something wider than absolutely valid candidature, and they are at any rate consistent with the view that any person who was in fact a candidate may present and maintain a petition," and he went on to say that there was no "sufficient reason why the words should be limited even to persons who have been in fact nominated in due form."

[BRANSON J. That case decided that a person who was in fact a candidate could present and maintain a petition, but you are seeking to put a construction upon the section so as to allow a person who was in fact not a candidate at this election to present a petition.]

The case shows that the section cannot be strictly interpreted. If a person alleges himself to be a candidate with some colour of foundation in fact for the allegation that is sufficient to entitle him to present a petition. (2)

Stuart Bevan K.C. and *D. N. Pritt* for the respondent. This petition cannot be heard. In order that a person may qualify himself as a petitioner he must comply with the requirements of s. 88, sub-s. 1, of the Act of 1882, and allege himself to have been a candidate at the election. The term "candidate" is defined in s. 77. In the present case the petitioner, Sir H. G. Fordham, was not elected, and the case states that

(1) [1899] 1 Q. B. 852, 859.

(2) The second question raised by the petition was not argued.

he had not prior to the election declared himself to be a candidate for election to the office of county alderman. A person cannot declare himself to be a candidate for election after the election; the declaration that he was a candidate for election must be made before the election takes place. Therefore unless the petitioner can show that he had been nominated he is not entitled to present the petition. Nomination is dealt with in the Municipal Corporations Act, 1882, as something quite distinct from an election. There is an elaborate code of rules in Part II. of the Third Schedule dealing with the nomination of candidates for the office of councillor (s. 55). These rules provide that the nomination must be in writing and must take place seven days at least before the day of election. The names and addresses of the persons nominated are to be printed and fixed to the Town Hall four days before the day of election. Notice of the nomination is to be sent to each candidate, and the nomination of a person who is abroad shall be void unless he has given his written consent one month before the day of nomination. The rules therefore draw a clear distinction between the act of nomination and the act of election, and when the word nomination is used in the Act it means something quite separate and distinct from an election. Sect. 60, however, which deals with the election of aldermen, contains no provision for the nomination of aldermen, and in fact no nomination for that office is required, and therefore the words "having been nominated" in s. 77 have no application in the case of an election for the office of aldermen. Under s. 2 of the Local Government Act, 1888, a person need not be a councillor in order to be qualified to be elected as county alderman.

[ACTON J. How can a person who is not a county councillor be said to be a candidate for election as a county alderman?]

Willoughby Williams in reply. The definition of a candidate in s. 77 applies to a candidate for election to a corporate office, and by s. 7 "corporate office" includes the office of alderman, and therefore the words in s. 77 "having been

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nominated" apply to an election for county alderman. The Act contains no provision for nomination for the office of alderman unless the putting of a person's name on a voting paper by a voter is a nomination.

ACTON J. This is a special case which raises, initially, the following question: whether upon certain facts stated in paras. 4 and 6 of the special case the petitioner is right in alleging himself to have been a candidate at an election of county aldermen, and therefore entitled to present this petition. The facts material to the determination of this question, which are stated in paras. 4 and 6 of the case, are as follows: that at an election of county aldermen held on March 14, 1925, among the voting papers signed and personally delivered to the respondent, who was chairman of the County Council and in the chair at the meeting, and openly produced and read or caused to be read by him, there was one voting paper containing a vote for the petitioner amongst others as a county alderman of the County Council, and neither the petitioner, who was otherwise qualified to be an alderman for the said County Council, nor the respondent had, prior to the voting papers being delivered to the respondent and produced and read or caused to be read, declared himself to be a candidate at the said election of county aldermen. The only material statement in para. 6 is that with regard to the petitioner, for at the present stage of this matter we are not concerned with the position of the respondent.

The matters with which we are concerned for the purpose of deciding this question, are, first of all, the definition of the word "candidate" in s. 77 of the Municipal Corporations Act, 1882, which reads as follows: "'Candidate' means a person elected, or having been nominated, or having declared himself a candidate for election, to a corporate office"; and by reference to s. 7 of that Act it appears that corporate offices include the office for which the petitioner in the present instance alleges himself to have been a candidate—namely, the office of alderman of a county council. The section which deals with the election of persons to that corporate office is s. 60

of the same Act, headed "Election of Aldermen," and it is not without importance, at the same time that that section is being considered, to refer to the sections under the Municipal Corporations Act of 1882 and the Local Government Act of 1888, which deal with the persons eligible for election to the office of alderman of a county council. Those sections are s. 2 of the Local Government Act of 1888 and, what is perhaps more important, s. 14 of the Municipal Corporations Act of 1882.

With regard to the true meaning of the words "a person alleging himself to have been a candidate," light is thrown upon them by the judgment of Wright J. in *Harford* v. *Linskey* (1), where the learned judge says: "The words 'a person alleging himself to have been a candidate' cannot of course mean that a mere allegation without any colour of foundation in fact would suffice. Such a merely false allegation would be properly dealt with in a summary way. But the words used seem designed to express something wider than absolutely valid candidature, and they are at any rate consistent with the view that any person who was in fact a candidate may present and maintain a petition, just as persons who voted in fact may do whether or not they had a right to vote." Upon that the question arises whether the petitioner who, in the words of the petition, is alleging himself to have been a candidate at the election in question, was a person who in fact was a candidate at that election. For the purpose of deciding that question it is necessary to return to the definition clause in s. 77 of the Municipal Corporations Act of 1882: "'Candidate' means a person elected, or having been nominated, or having declared himself a candidate for election, to a corporate office." It is clear that the petitioner in the present case was not elected, no one contends that he was, nor, of course, is there any finding in the special case to that effect. No one contends that he was a person who had declared himself a candidate for this election, and therefore the only question is whether he can be said to have been a person who had been nominated a candidate for election on this occasion.

(1) [1899] 1 Q. B. 852, 859.

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Acton J.

The argument which has been advanced by Mr. Willoughby Williams on behalf of the petitioner is that when a voter voted for the petitioner by writing his name and address upon the voting paper and subscribing his signature, his act had a dual effect; that it was at once a nomination and a voting for the petitioner, and that by virtue of such nomination the petitioner became a person who had in fact been nominated as a candidate for this election.

The argument on the other side is that nomination is something which takes place anterior to and distinct from the actual process of voting at an election, and that in the present instance there was no nomination, because under the sections of the statutes to which I have referred, no nomination is called for, or indeed possible in the strict sense of nomination, and all that is required or is in fact done is that voting takes place without any nomination, as a result of which persons may or may not be elected.

If the argument for the petitioner were to be accepted, the conclusion arrived at would be this, that a person, who it might be was not even a member of the county council, and who was not even aware that an election was taking place or that any one contemplated introducing his name at the meeting of the county council at which the election was to take place, might have his name written, entirely without his knowledge or approval, upon a voting paper by a single voter, and thereby become a person nominated a candidate for the election with all the possible consequences which follow upon such a result.

In my view it cannot be said that the petitioner here was a person who was nominated a candidate for election as a county alderman, and that being so, in accordance with the terms of the special case itself, it follows that the petitioner is not a person who is qualified to petition, and the petition must therefore be dismissed.

BRANSON J. I agree. The whole matter turns upon the definition of the word "candidate" in s. 77 of the Municipal Corporations Act of 1882. I think it must be borne in mind

that the statute in which this definition clause occurs provides for elections of councillors who have to be nominated before they are elected. It also provides for the election of aldermen who are not required to be nominated before they are elected, and the section contains a definition which is applicable to both those sets of facts. Under it "'candidate' means a person elected, or having been nominated, or having declared himself a candidate for election." What Mr. Willoughby Williams is seeking, as I understand his argument, to establish, is the proposition that the whole of the definition in s. 77 must be applied to both forms of election, and to say that in an election in which no nomination is required it must be assumed that election and nomination are rolled into one, or that the act of voting for a person is also a nomination of that person. It seems to me that this is entirely wrong. When the section refers to nomination it is referring to the procedure which is laid down for nomination by the statute, and in an election where no such process is required to be gone through, there is no nomination at all. In the present case it is plain that the petitioner was not elected, it is also plain that the petitioner never declared himself a candidate for election, and I think it is equally plain that he never was nominated, because no nomination was required or was thought of in the election of aldermen in question. The result is that the petitioner fails to bring himself within the definition of the word "candidate," and therefore the answer to question one of the special case, which asks whether upon the facts stated the petitioner is right in alleging himself to have been a candidate at the said election and entitled to present this petition, is in the negative, and the petition must be dismissed.

Petition dismissed.
Leave to appeal refused.

Solicitors for petitioner: *Sharpe, Pritchard & Co.*
Solicitors for respondent: *Mackrell & Ward, for S. J. Miller, Cambridge.*

R. F. S.

1925
Feb. 4, 5.

MOSS *v.* CHRISTCHURCH RURAL DISTRICT COUNCIL.

ROGERS *v.* SAME.

Damages—Measure of—House burnt down—Difference between value before and after fire.

A cottage was almost completely destroyed by fire caused by a spark emitted from a steam-roller which was found to constitute a nuisance. In assessing the damages recoverable by the owner of the cottage:—

Held, that the measure of damage was not the fair cost of rebuilding the cottage and making it as good and habitable as before the fire, but the difference between the money value of the owner's interest before and after the fire.

APPEAL from an Official Referee.

The plaintiffs sued the defendant council for damages in the following circumstances: the defendants, who were the highway authority for the district, owned and used, under their statutory powers, a steam-roller. While this steam-roller was travelling to the place where rolling was to be done a spark emitted from it set fire to a cottage, seriously damaging the fabric and destroying a quantity of the household effects therein. The cottage belonged to the first plaintiff, Mrs. Moss, and the household furniture and effects belonged to Mr. Rogers, who was a weekly tenant of the cottage. The actions were based on negligence, and, in the alternative, on nuisance. The Official Referee found that the defendants were guilty of negligence and that this negligence caused the fire; he also found that the steam-roller at the time constituted a nuisance, and that the defendants were therefore liable for the fire apart from negligence. Accordingly he gave judgment for the plaintiffs, assessing the damages in each case at the cost of replacement.

The defendants appealed.

Randolph Glen for the defendants. (1) In assessing the damages the Official Referee applied the wrong principle. In each case the plaintiff was entitled to recover only the value

(1) As the case is reported only on the question of damages, the argument is confined to this point.

of his property at the time it was destroyed; not the cost of replacement. In *Lukin* v. *Godsall* (1) where, owing to the negligence of A. in building his house adjoining that of B., the house of B. was thrown down, B. was held entitled to recover only such a sum as represented the value of the old house, and not the expense of building a new one. Again, in *Hosking* v. *Phillips* (2) it was laid down that the proper measure of damage was the amount by which the property was lessened in value by the wrongful act: see also Mayne on Damages, 9th ed., p. 424.

C. J. Conway for the plaintiffs. In the general case the damage recoverable is, I agree, the difference between the value before and after the fire. Here, however, it is submitted that there was evidence which entitled the Official Referee to assess the damages as he did. The household effects belonging to the plaintiff Rogers were practically new. As to the house, it was left entirely on the hands of the plaintiff, Mrs. Moss.

[He cited *Duke of Newcastle* v. *Broxtowe Hundred.* (3)]

Glen in reply cited *Murphy* v. *Wexford County Council.* (4)

SALTER J. [after holding that there was evidence which entitled the Official Referee to come to the conclusion that the steam-roller as it was at the material time constituted a nuisance, and that it was therefore unnecessary to consider the question of negligence, continued:] I come now to the question of damages. The Official Referee, in assessing the damages for the destruction of the furniture, etc., and the cottage, has taken the cost of replacement as the measure of damages. I think, strictly and technically, that is not correct. The measure of damage is the value to the owner of the property at the time it was destroyed. Upon the facts of this case I am not prepared to say that the amount of damage which the Official Referee assessed in respect of the household furniture and effects was not correct. There was evidence that these articles were practically all new, and there is no reason to

(1) (1795) 2 Peake, 15.
(2) (1848) 3 Ex. 168.
(3) (1832) 4 B. & Ad. 273.
(4) [1921] 2 I. R. 230.

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MOSS v. CHRISTCHURCH RURAL COUNCIL. ROGERS v. SAME.

Salter J.

think that the value to the owner and the cost of replacement were in any way different. The appeal therefore in the case of Rogers fails. In the other case, where Mrs. Moss claims for the destruction of the cottage, the Official Referee has adopted the same measure of damages. He has assessed such a sum as he found to be the fair cost of reinstatement and rebuilding the house or such part of it as was destroyed or injured, and making it as good and habitable as before. That is not the correct measure. There may conceivably be cases where the true measure of damage is less than the cost of replacement, and it is easy to imagine cases where the measure of damage may be far greater. Suppose irreparable damage has been done to some historic building. No one would suggest that the mere cost of putting new bricks in place of the old would be the full measure of damage or would fairly represent the actual loss. The true measure of damage is the difference between the money value of Mrs. Moss's interest before the fire and the money value of her interest after the fire. She was a reversioner. It is true that the estate in possession was only a weekly tenancy, but a weekly tenancy in these days in which the Rent Restriction Acts apply may be a formidable thing. There was, in my opinion, no evidence before the Official Referee of the money value of the house either before or after the fire, and the case must therefore go back to him to have the damages assessed upon the proper basis.

FRASER J. I agree.

Appeal in Rogers's case dismissed; in Moss's case allowed and remitted to Official Referee for assessment of damages.

Solicitors for plaintiffs: *Dawes & Sons.*

Solicitors for defendants: *Lovell, Son & Pitfield, for R. E. Druitt, Christchurch.*

J. S. H.

[IN THE COURT OF APPEAL.]

C. A.
1925
June 29, 30.

COOPER (INSPECTOR OF TAXES) *v.* STUBBS.

Revenue—Income Tax—Speculations in Cotton—Contracts for future Delivery —Practice of Cotton Brokers—Gambling Transactions—Trade or Vocation —Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, para.* 1 (*a*) (*ii.*), (*b*); *Cases I. and VI.*

The appellant appealed against assessments to income tax made under Sch. D to the Income Tax Act, 1918, in sums of 1982*l.*, 4200*l.* and 4302*l.* for the years ended April 5, 1921, April 5, 1922, and April 5, 1923, made upon him by the Additional Commissioners for the Division of Liverpool. The appellant was a member of a firm of cotton brokers and cotton merchants. It was the practice of such firms to protect themselves against violent fluctuations in the market by buying cotton for future delivery against sales made and vice versa. Such contracts for future purchase or delivery of American cotton were made through the exchanges in Liverpool, New York, or New Orleans, and any person, whether connected with the cotton trade or not, could enter into such transactions through an accredited broker. Dealings of this kind were known as dealings in "futures." The assessments in question were made upon the appellant in respect of profits made in such dealings. These dealings were private speculations of the appellant in which his firm had no interest. The future delivery contracts were entered into by him with no intention of taking actual delivery of the cotton or of using them as "hedges" for actual transactions in order to safeguard his position whatever the price of cotton might be in the future, but were, as the Commissioners found, gambling transactions:—

Held (by the Master of the Rolls), that these transactions constituted a trade within the meaning of Sch. D, para 1 (*a*) (ii.), of the Income Tax Act, 1918, carried on by the appellant, and were chargeable in accordance with the rule applicable to Case I.

Held (by Warrington and Atkin L.JJ.), that no question of law was open for the Court under Case I., but the profits arising from such transactions were annual profits or gains not charged under Sch. A, B, C or E, and not specially exempted from tax within Sch. D, para. 1 (*b*), of the Act of 1918, and were chargeable in accordance with the rules applicable to Case VI.

Quaere, whether betting transactions which produce a revenue to the person who engages in them may not result in profits which are assessable to tax.

Decision of Rowlatt J. affirmed.

APPEAL from a decision of Rowlatt J. on a case stated under the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Special Commissioners held on

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January 18, 1924, for the purpose of hearing appeals the appellant, Henry Stubbs, appealed against assessments to income tax in the sums of 1982*l.*, 4200*l.* and 4302*l.* for the years ended April 5, 1921, April 5, 1922, and April 5, 1923, respectively, made upon him by the Additional Commissioners for the Division of Liverpool under the provisions of the Income Tax Acts.

2. The assessments under appeal were made upon the appellant under Sch. D of the Income Tax Act, 1918, in respect of profits from private transactions in cotton futures entered into by him in the circumstances hereinafter set out.

3. The appellant was a partner in the firm of Richard Stubbs & Co., which carried on the business of cotton brokers (i.e., selling on commission to spinners and merchants and buying and selling for clients on future delivery contracts) and cotton importers (i.e., acting as merchants on their own account). In all material years up till the death of Richard Stubbs, Senior, in 1919, the partners in the firm were Richard Stubbs, Senior, the appellant and Richard Stubbs, Junior. After the death of Richard Stubbs, Senior, the partners were the appellant and Richard Stubbs Junior. On the death of Richard Stubbs, Junior, on October 2, 1922, the business ceased, and the appellant retired temporarily from business. He resumed business after an interval of about six months.

4. The course of business of cotton merchants in general and of the appellant's firm was as follows :—

(*a*) Owing to the uncertainty of the quantity and quality of the cotton crop the price of cotton was subject to violent and rapid fluctuations. In order to protect himself against such fluctuations between the time of buying and selling or vice versa, a merchant usually effected a cover or hedge each time he made a purchase or sale of actual cotton.

(*b*) On a purchase by a merchant of actual cotton, for which he had not yet found a purchaser, the merchant effected a hedge by making a contract for the sale of the same quantity of cotton for delivery in some month in the future. Conversely on a sale of actual cotton not yet purchased the merchant effected a hedge by making a contract for the

purchase of the same quantity of cotton for delivery in some month in the future.

These hedging contracts were known as future delivery contracts. The future delivery contract, though differing in some important respects from the contract for the purchase or sale of actual cotton, provided for the delivery of actual cotton, but it was only exceptionally that a future delivery contract was entered into with the intention of taking up actual cotton, and it was almost invariably closed out, as explained in para. (*d*) below, by entering into another future delivery contract to cancel out with the one originally entered into.

(*c*) By means of these hedges at any given time the total amount of cotton bought or contracted to be bought by the merchant (whether as actual cotton or under a future delivery contract) balanced his total commitments for sale of cotton (either as actual cotton or under future delivery contracts), and thus the risk of any rise or fall in the general price of cotton between the time of purchase and sale of actual cotton was eliminated. On the subsequent sale or purchase of the actual cotton the relative hedging contract was nearly always closed out by the merchant.

(*d*) Future delivery contracts were dealt in on the Liverpool, New York and New Orleans cotton markets. Under the rules of the Liverpool Cotton Association, of which the appellant was a member, there was a provision that where purchases and sales were made between the same members of the Association for the same quantity of cotton for delivery in the same month, the contracts were closed out, and the transaction was concluded by the receipt or payment of differences. The vast majority of future delivery contracts were closed in this way, both in Liverpool, New York and New Orleans.

(*e*) Besides the ordinary future delivery contracts, the appellant's firm from time to time entered into the operation known as a straddle, which consisted of entering into a future delivery purchase contract in Liverpool and a future delivery sale contract for the same amount of cotton in New York or

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New Orleans, or vice versa. When actual cotton was bought or sold one side of the straddle would be closed, leaving the firm with the other side of the straddle as a hedge against the actual cotton. Straddles were entered into in anticipation of subsequent transactions in actual cotton, and in some cases these straddles would be closed without any actual cotton being bought. While a complete hedge against fluctuations in the price could be effected by the ordinary future delivery contract, the straddle was useful in the import business as a protection against fluctuations in the rate of exchange and in the cost of shipping actual cotton.

(*f*) The firm varied their hedges frequently in consequence of fluctuations in the market: for instance, they altered a future delivery contract for one month into a future delivery contract for another month, or they sold future delivery contracts in Liverpool and bought corresponding future delivery contracts in New York or New Orleans, if they thought that the course of business would make the alteration advantageous.

(*g*) In accordance with a common custom among cotton merchants, the firm employed an arrivals salesman to transact on the Exchange the future delivery contract business of the firm. In addition to the future delivery contracts necessary to the firm or their clients for hedging, which were bought or sold on the instructions of the firm, the arrivals salesman was allowed to deal on his own initiative in future delivery contracts not required for hedging. This dealing was entered into not so much with the object of profit as with the object of enabling the arrivals salesman to keep in touch with the futures market. All these deals were closed at the end of the day, so that no great risk of loss was involved. It was the common practice of cotton merchants to authorize their arrivals salesman to enter into such deals. The arrivals salesman received 30 per cent. of the profits on these deals, the balance going to the firm, who bore any losses. The average number of these transactions was between 1000 and 1100 a year. The firm's profits or losses on these transactions were included in the accounts of their business.

5. The Commissioners stated that they were satisfied that the appellant's firm entered into future contracts, including the straddles, as a protection or hedge against their transactions in actual cotton, that the contracts formed a legitimate and in fact an essential part of their business of cotton merchants, and that the speculative deals entered into by the arrivals salesmen were ancillary to this business.

6. Future delivery contracts were also entered into by members of the Liverpool Cotton Association and others, not as hedges to transactions in actual cotton, but purely as speculative transactions, with a view to making a profit on the rise or fall, as the case might be, in the market price of the contracts. Future delivery contracts entered into with this object were always closed out by entering into a similar contra contract, as described in para. 4 (*d*), differences being received or paid. The profit or loss on the transaction was then ascertained. This form of transaction constituted in the opinion of the Commissioners nothing more nor less than gambling in differences.

7. During the material years the appellant entered into speculative transactions on his own behalf in future delivery contracts without any intention of taking up actual cotton, or of using the contracts as hedges for actual cotton transactions. His partners had knowledge of, but no interest in, these transactions. Nearly all the transactions were done through the appellant's own firm, which, except in the last year, charged him brokerage on buying or selling the contracts. These transactions differed from the speculative transactions entered into by the arrivals salesman of the firm, as the appellant's transactions were generally open for more or less lengthy periods, while the firm's speculative transactions were invariably closed on the same day.

8. The number of bales of cotton (all dealings being in multiples of 100 bales) involved in the appellant's transactions for the six years ended September 30, 1922, was shown in a statement annexed to the case. The number of separate transactions entered into by the appellant for the three years ended September 30, 1922, were as follows :—

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For the year to September 30,				1920	.. ..	38
,,	,,	,,	,,	1921	.. ..	51
,,	,,	,,	,,	1922	.. ..	61

Particulars of the numbers of separate transactions for the earlier years were not available. The profits and losses on the appellant's transactions were shown in a statement annexed to the case. The statement showed the computation of the profits arising from the said transactions returned by the appellant in his returns of untaxed income for the three years ended April 5, 1921, 1922 and 1923 respectively, on which returns the assessments under appeal were based. Copies of the said returns were also annexed and formed part of the case. For the purposes of comparison between the amount of the profits of the business of the appellant's firm and the profits from the appellant's private transactions, a schedule of the assessable profits of the firm for the material years was also annexed and formed part of the case.

9. It was contended on behalf of the appellant :—

(1.) That his dealings in future delivery contracts did not constitute the carrying on of a trade, and the profits arising from these dealings were not assessable to income tax under Case I. of Sch. D, and

(2.) That these dealings were gambling transactions, and as such were not assessable to income tax under Case VI. of Sch. D.

10. It was contended on behalf of the Crown (inter alia) :—

(1.) That the profits arising to the appellant from his dealings in future delivery contracts were annual profits or gains arising or accruing to him from a trade, profession or vocation carried on by him, and were chargeable to tax under Sch. D, 1 (*a*) (ii.), of the Income Tax Act, 1918 ;

(2.) Alternatively, that the profits arising to the appellant from his dealings aforesaid were other annual profits or gains not charged under Sch. A, B, C or E, and not specially exempted from tax, and were chargeable to tax under Sch. D, 1 (*b*), of the said Act ;

(3.) That the said assessments were correct, and should be confirmed.

11. The Commissioners held that the appellant did not deal in future delivery contracts so habitually and systematically as to constitute those dealings the carrying on of a trade, and that the profits arising therefrom were accordingly not assessable under Case I. of Sch. D. They further held that the dealings were gambling transactions, and that the profits arising therefrom were not annual profits assessable under Case VI. of Sch. D. They accordingly discharged the assessments under appeal.

The question of law for the opinion of the Court was whether the profits arising to the appellant from his dealings in future contracts were profits assessable to income tax under Sch. D.

Rowlatt J. answered the question in the affirmative, and reversed the decision of the Commissioners.

The appellant appealed. The appeal was heard on June 29 and 30, 1925.

Sir Leslie Scott K.C., *Latter K.C.* and *H. P. Glover* for the appellant.

Sir Douglas Hogg A.-G. and *R. P. Hills* for the Crown.

The arguments sufficiently appear from the case and the judgments.

[The following cases were referred to: *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1); *Partridge* v. *Mallandaine* (2); *Graham* v. *Green* (3); *Erichsen* v. *Last* (4); *Thacker* v. *Hardy* (5); *Currie* v. *Inland Revenue Commissioners* (6); *Ryall* v. *Hoare* (7); *Coman* v. *Governors of Rotunda Hospital, Dublin* (8); *Attorney-General* v. *Black* (9); *Inland Revenue Commissioners* v. *Greenwood*. (10)]

POLLOCK M.R. This is an appeal by Henry Stubbs against a judgment of Rowlatt J., who held that he was liable in respect of three assessments to income tax made upon him

(1) [1921] 2 K. B. 403.
(2) (1886) 18 Q. B. D. 276.
(3) Ante, p. 37.
(4) (1881) 8 Q. B. D. 414.
(5) (1878) 4 Q. B. D. 685.
(6) [1921] 2 K. B. 332.
(7) [1923] 2 K. B. 447.
(8) [1921] 1 A. C. 1.
(9) (1871) L. R. 6 Ex. 78, 308.
(10) [1921] 2 A. C. 171.

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in the years 1921, 1922 and 1923, upon sums respectively in these years amounting to 1982*l.*, 4200*l.* and 4302*l.* It appears that the appellant is a cotton broker, and during the years in question he was a partner in a firm which was carried on by him in company with members of his family. There were three partners in the first year, but Richard Stubbs, Senior, died, and then the business was carried on by Richard Stubbs, Junior, and the appellant until some time in October, 1922, when upon the death of Richard Stubbs, Junior, the business came to an end. The appellant apparently after October, 1922, ceased business for about six months and then resumed it, beginning again in a period which, I suppose, is outside the period of assessment, and was something like April, 1923, which would be a period falling for assessment to tax 1923–24.

Now during those three years in which the assessments were made upon him we have been told by the case which has been stated by the Commissioners the mode in which the business of the partnership was carried on upon the Liverpool Cotton Exchange, but no question arises as to the assessment of the firm upon the trade carried on by the firm. The reason why we have been told by the Commissioners how business is carried on by cotton brokers is in order to make a contra-distinction between the business of the firm and the business which it is now said the appellant is liable to pay tax upon. It appears that the appellant in addition to the business which was carried on by the firm, of which he was a partner, had individual and separate private transactions. Those transactions were in respect of future delivery contracts which he entered into, and during the material years we are told that the appellant entered into these future delivery contracts without any intention of taking up actual cotton or of using the contracts as hedges for actual transactions in order to safeguard his position, whatever the price of cotton might be in the future, but they were entered into as speculative transactions, and they are stated by the Commissioners to be in their opinion nothing more nor less than gambling in differences.

It is important to observe what those transactions were.

They were contracts for future delivery. They were transactions of which his partners had knowledge, but in which they had no interest. Nearly all the transactions were done through the appellant's own firm, and that firm, except in the last year, charged him brokerage on buying or selling contracts. It appears that on the Cotton Exchange it is a common practice to make future delivery contracts sometimes for the purpose of testing the market, sometimes for the purpose of hedging against actual business done; but in the contracts which are the subject matter of this assessment the appellant's transactions were carried out a little differently from those transactions, because he kept his contracts open generally for more or less lengthy periods, whereas the firm's speculative or testing transactions, whichever they are to be termed, were invariably closed on the same day. Now the number of the appellant's transactions was considerable. In the several years in respect of which assessments are made there were thirty-eight in the first year, fifty-one in the second, and sixty-one in the third. The profits which were derived from these transactions were also considerable, for the figures which I have already recounted indicate that in the first year something like a profit of 2000*l.* was made, whereas in the subsequent years a profit of over 4000*l.* was made. Inasmuch as that class of business showed a personal profit or gain to the appellant, it would appear, prima facie, that the Commissioners would be right in assessing him in respect of those profits and gains so made. But it is claimed that, in fact, they were mere gambling transactions, that the appellant was not a person who carried on the business of gambling in the sense that a bookmaker carries on the business of gambling and is assessable to income tax, and that they were a number of transactions carried on for the purpose of obtaining fortuitous gains if possible, but that they must be treated and considered as quite apart from anything like his business or any business in which he was engaged, and so are not part of his profits or gains for the several years of assessment.

Now those are the facts. The difficulty that we have in this case is as to what has been found by the Commissioners

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who have stated the case which went before Rowlatt J. The Commissioners came to the conclusion that the dealings which are in question were gambling transactions, and that the profits arising from them were not annual profits assessable to income tax.

It is perfectly clear that the Commissioners are the judges of the facts. It is for them to find the facts. The Court—whether the Court of first instance before whom the case stated comes or the Court of Appeal—are bound by the facts which have been found by the Commissioners, and if they have rightly directed themselves in law their decision cannot be interfered with. Rowlatt J. came to the conclusion, as I understand his judgment, that the Commissioners had not rightly directed themselves in law, and he held that the appellant was liable to be assessed in respect of these profits and gains. It has been forcibly and strenuously argued that the Commissioners, in coming to that conclusion, did so on a question of fact, and that Rowlatt J. was not entitled to set aside their decision, and equally that this Court is disabled from so doing; but after very careful consideration I have come to the conclusion that the ground on which the Commissioners have based their decision is not sound in law and therefore is capable of being reviewed, and must be reviewed by the Court before whom the special case comes. The Commissioners' finding of fact is contained in para. 11 of their case, and it is as follows: "We held that the respondent did not deal in future delivery contracts so habitually and systematically as to constitute these dealings the carrying on of a trade, and that the profits arising therefrom were accordingly not assessable under Case I. of Schedule D." Case I. is the ordinary case under which annual profits or gains are subjected to income tax. The Commissioners proceed: "We further held that the dealings were gambling transactions, and that the profits arising therefrom were not annual profits assessable under Case VI. of Sch. D." Case VI. is what has been termed before now the sweeping up clause, which refers to annual profits or gains not comprised in or embraced under any of the previous Cases.

I do not think that the Commissioners intend that their two findings are to be antithetic or that we are to take it that they have found that it is not the carrying on of a trade because it was gambling, but I think one must take these two findings separately. Even so, however, it appears to me that in their first finding the Commissioners have not rightly directed themselves in law. It does not appear to me that a habit or system were characteristics necessary to finding that there was a trade in this case. The appellant carried on a trade or business. He was a cotton broker, and he had the means and the knowledge for engaging in certain transactions upon the Cotton Exchange according to his own business ability and experience, and he entered into a number of transactions which were real transactions. It is clear from *Thacker* v. *Hardy* (1) and other cases that these future delivery contracts which are made upon the Cotton Exchange or the contracts which are made upon the Stock Exchange in London are real contracts in the sense that the party with whom they are made is a real party, and if the dealer or broker making them should desire at any moment to have the contract implemented he can do so. There is no distinction between contracts which are made for the purpose of speculative dealings and contracts which are made for the real purpose of securing the sale or purchase of stock or cotton. The appellant himself carried on the trade of a cotton broker, and had entered into a number of these real transactions. He was charged by his firm brokerage upon them. It may be that they were speculative in the sense that they were for his own purposes a speculation. It may be that in a loose and colloquial sense of the words they were gambling transactions, and that it may be said that he was gambling in making these contracts, but the purpose for which he made them did not alter the character or nature of the contracts that he did make: they were real transactions, although the purpose of them may have been in his mind, in respect of all or some of them, to fulfil his desire to gamble in speculative transactions. Testing these

(1) 4 Q. B. D. 685.

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transactions from that point of view it does not appear that the habit or system affords a true test of whether or not they were such dealings as indicate a carrying on of a trade. Apparently the Commissioners considered that they were not so many or so habitually and systematically entered into as per se if taken alone to prove that this business, if treated as an independent business, was such a business as indicated a separate trade on his part; but the basis of their finding is that there was no habit or system in them. On the other hand, it is clear that these adventures were entered into by him successively in a number of years for large amounts. They amounted to a number of transactions, and in all it is important to remember that the contracts were real contracts, which no one except the appellant himself could treat or deal with otherwise than as real contracts. If he was minded at the end of his own time to close them, well and good; if, on the other hand, he was minded at any time to take delivery or to give delivery he could have done so. It appears to me, therefore, that the test that has been applied in this first limb of para. 11 of the case is not a true test in law, and therefore that the Commissioners have misdirected themselves in holding that this business so carried on by appellant did not constitute the carrying on of a trade. If it was the carrying on of a trade then he is liable under Case I. of Sch. D, and when one is dealing with the question whether a man is carrying on a trade it is important to notice the alternative words which are to be found in s. 237 of the Act of 1918, that trade includes "every trade, manufacture, adventure or concern in the nature of trade." The appellant was a cotton broker: he did enter into these transactions in the course of his business for his own purposes, but they were real contracts made for his own purposes and because he was a cotton broker. It appears that he did engage in trade in the sense in which that is to be understood, and therefore these profits fall to be assessed under Case I. of Sch. D.

The Commissioners go on to say: "We further held that the dealings were gambling transactions." I am not quite certain what they mean by that, and it is not necessary to

decide. It appears to me rather that they have used the word "gambling" in some colloquial sense, as meaning that they were fortuitous profits obtained by these independent transactions—independent therefore from the necessary transactions of the business—and it may be that the second part of the finding is coloured by this, that there was not a system or habit in the gambling transactions so as to bring the appellant within the decisions under which a bookmaker is held to be carrying on a trade, and they also held that the profits arising from such transactions were not annual profits assessable under Case VI. of Sch. D. Case VI. sweeps in all other profits and gains which are not included in the other cases under Sch. D. But to my mind when rightly tested the contracts which were made by the appellant over these years in successive series of contracts do constitute a business, and it is not a right test in law to try and apply the touchstone of habit or system in order to ascertain whether or not a trade was carried on.

For these reasons it appears to me that the Commissioners misdirected themselves on the point that they had to consider, and that Rowlatt J. was right in the conclusion to which he came—namely, that the Commissioners having misdirected themselves the case fell within Case I. of Sch. D, and the appellant was liable to be assessed.

I would like to add that the claim was not only placed under Sch. D, para. 1 (*a*) (ii.), of the Act of 1918, but under Sch. D, para. 1 (*b*), which is the forerunner of Case VI., and it may well be that these profits or gains could be dealt with and be charged under Case VI. The simpler form, however, appeals to me, and I think the Crown is right in saying that the subject is entitled to know what is the specific Case under which he is charged, and if they do fall under Case I. it is unnecessary, and I think wrong, to put them under the lesser case rather than under the more specific one of Case I.

For these reasons, while I desire to adhere most closely to the rule that the Court ought not to interfere with the Commissioners on a finding of fact, I have come to the conclusion that the Commissioners have misdirected themselves, and

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that upon the facts as they have found them the true conclusion in law is that the appellant's dealings are such as to constitute a trade, adventure or concern in the nature of trade and to bring these dealings, entered into it may be for his own purpose and in his own mind as speculative transactions, within the charge under Case I. Therefore the assessments have been rightly made, and the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion, though not for quite the same reasons.

The question submitted to the Court by the case stated by the Commissioners is thus expressed: "The question of law for the opinion of the Court is whether the profits arising to the respondent (the appellant in the present appeal) from his dealings in future delivery contracts are profits assessable to income tax under Sch. D." The charging section in Sch. D is para. 1, which, so far as material, is in these terms: "Tax under this Schedule shall be charged in respect of—(*a*) The annual profits or gains arising or accruing . . . . (ii.) to any person residing in the United Kingdom from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." "Trade" is defined by s. 237 as including "every trade, manufacture, adventure or concern in the nature of trade." Clause (*b*) of para. 1 is: "All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax." The question is whether the profits mentioned in the case come under either of those two charging provisions.

The appellant is a member of a firm of cotton brokers or merchants carrying on an extensive business in Liverpool. In that business they have made considerable profits on which income tax has been assessed and paid, and as to which no question arises. But the appellant, in common with many other persons engaged in the business in which he was engaged, on his own account and independently of his firm, had dealings

in future delivery contracts which, at all events so far as he was concerned, were simply speculations in future differences. The question is whether the profits arising from these dealings of the respondent are assessable to tax. The dealings in question, and the appellant's part in them, are thus described in paras. 6 and 7 of the case. [His Lordship read the paragraphs and continued:] Then in the next paragraph (para. 8) of the case, which I do not propose to read, the Commissioners state the amount and number of these particular dealings on the part of the appellant, and we have the details more or less complete of those transactions for six years. It is enough to say that the dealings were considerable in amount; that in some years the profits were large and in others there were losses; but the profits were of a considerable amount, and they were regular in every year of the six years to which the documents before us relate. It is to be borne in mind, also, that these dealings were dealings by a man who was skilled in the knowledge of the market—experienced in the particular trade, and using, no doubt, his skill and knowledge and experience with a view to determining whether a particular speculation was likely to turn out profitable, or the reverse. Moreover, there was nothing whatever in the facts found by the Commissioners to show that, as regards the other parties to them, the contracts were anything other than ordinary commercial contracts.

On these facts two questions arose for decision by the Commissioners. They are stated by them in their statement of the contentions raised on behalf of the appellant as follows: [His Lordship read the contentions set out in the case and the findings of the Commissioners and continued:] These two findings are, in my opinion, quite separate and independent findings. The first is on what is really a question of fact, that the dealings in question did not constitute the carrying on of a trade. The second is not so much a finding of fact as a decision of law turning upon their independent findings of fact that the dealings were gambling transactions, and therefore in their opinion not assessable.

Rowlatt J., by whom the case was heard, came to the

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conclusion that the Commissioners were not justified in finding that the dealings of the appellant did not constitute a trade, and on that ground, without dealing with the further question as to Case VI. of Sch. D, allowed the appeal from the Commissioners.

The Commissioners are the judges of fact, and this Court, and every Court on appeal from the Commissioners, which has jurisdiction in questions of law only, is very much tempted, when it feels that it cannot agree with the Commissioners in their finding of fact, to find some reason in law by which that finding may be reversed. In my opinion the Court of Appeal ought to be very careful not to yield to that temptation, or to interfere with the decision of the Commissioners on a question of fact except in a very clear case, where either the Commissioners have come to their conclusion without evidence which should support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law. I do not say for one moment that Rowlatt J. was wrong in the conclusion at which he arrived, if he had been a judge of facts. On the contrary, although it is purely irrelevant as to what my own opinion is, I should have been inclined to agree with him; but he is not the judge of facts; nor am I; and I am not prepared to go so far as to say that there was no evidence upon which a tribunal such as the Commissioners could have arrived at the conclusion they did. It must be borne in mind that the Commissioners are men of business, who are for that reason selected to deal with these questions relating to income tax, and, as a tribunal, particularly well qualified to decide such questions of fact, and we ought not, nor ought the King's Bench, lightly to set aside their findings on such subjects. In my opinion this is not a case in which it can be said that there was no evidence upon which the Commissioners could arrive at that conclusion. I think, therefore, if it be material, that the finding of the Commissioners with regard to Case I. is one which ought to be accepted.

But then arises the second question, and on that, I think, the conclusion ought to be that the profits arising from the

dealings in question are annual profits or gains under para. 1 (*b*) of Sch. D, and would be classified under Case VI., which is this: "Tax in respect of any annual profits or gains not falling under any of the foregoing Cases, and not charged by virtue of any other Schedule." The Commissioners have come to the opposite conclusion, and I think they have done so on the ground, and on the ground alone, that these dealings were gambling transactions. In a sense they were gambling transactions, but in my view that circumstance, on the facts of the present case, at any rate, is irrelevant. They were gambling transactions so far as the appellant is concerned, because, as the Commissioners have said, he entered into them without any intention of taking up actual cotton, or using the contracts as hedges for actual transactions; but they were not wagering contracts, for the reason to which I have already alluded, that, so far as the other parties to the contracts were concerned, there was no evidence whatever that from their point of view they were not real contracts for the purchase or sale of cotton. The question therefore is simply this, were these dealings and transactions entered into with a view to producing, in the result, income or revenue for the person who entered into them? If they were, then in my opinion profits arising from them were annual gains or profits within the meaning of para. 1 (*b*) of Sch. D. On the findings of the Commissioners themselves they were contracts entered into with a view to making a profit on a rise or fall, as the case might be, in the market price of the contracts. They extended over a considerable number of years. There were large numbers of transactions in each of those years, from which in some years the appellant derived considerable revenue; and for myself I cannot see what there is to exclude that revenue from the tax which is charged under Sch. D. It seems to me, therefore, that, in this case, whatever may be the case under different facts, at all events the profits made by these transactions are annual profits or gains, and must be assessable to income tax.

I desire to reserve for consideration, when, if ever, it comes before this Court, the question whether betting transactions

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which produce a revenue to the person who engages in them may not result in profits which are assessable to tax. That question, when it arises, will have to be decided on the facts of the particular case. So far as this case is concerned, I think, for the reasons I have given, that the question stated by the case ought to be answered by saying that the profits arising to the appellant by his dealings in future delivery contracts are profits assessable to income tax under Sch. D, para. 1 (*b*), and that they should be classified under Case VI.

The result is that the appeal must be dismissed, and dismissed with costs.

ATKIN L.J. I agree that the appeal should be dismissed with costs, and I also agree it should be so for the reasons given by my Brother Warrington in the judgment he has just delivered, and as therefore I differ from the view expressed by the learned judge in the Court below, and as I find I also differ from the reasons given by the Master of the Rolls, I think it would be desirable that I should put into words the ground for the decision I have come to.

The case, it has been said, has been coloured throughout by the view taken by the Commissioners that these dealings in future contracts in cotton were gambling transactions, and, as I shall point out, I think that that is true as to one of the findings of the Commissioners, although I do not think that it did in fact colour their view as to their finding that this taxpayer in this case was not carrying on a trade. As I take it, the view that the Commissioners formed was that the transactions were in truth gambling transactions, but that whether they were gambling transactions or real transactions, it could not be said that the appellant was carrying on a trade or vocation unless a certain amount of habitual or systematic operations either in gambling or real transactions was proved, and that the transactions in question did not partake of that nature, and therefore, whatever they were, they could not properly be described as a trade. In order to dispose of the point about gambling, it appears to me it is sufficient to say that upon the evidence in this case it seems reasonably clear

that all the contracts that were entered into by the appellant, whether they were entered into by him through his firm or through other brokers, were in fact real transactions. They gave rise to real contractual rights: they were contracts either for the purchase or for the sale of cotton in the future which could be enforced, and so far as the other party to the contract, who might be a dealer in this country, or a dealer in America, was concerned, he would not know whether the contract into which he had entered would be eventually closed by a contra contract or whether it would not. For these reasons it seems to me to be plain law that transactions such as the appellant entered into were real transactions and were not mere bets. I think that the principle in respect of wagering is this, that it takes two parties to make a bet, and, that if you consider one party alone, you do not sufficiently consider all the elements of the case; you have to consider the other party, and unless that other party is also betting there cannot be a bet. Therefore these transactions were, as I have said, real and enforceable contracts, in which the differences could have been sued for on one side or the other. It is true that they were speculations, and I think myself that that may be one of the material facts to be considered in respect of the question whether or not the appellant was engaged in a trade, because for my part I see some difficulty in forming a conception of a trade which consists solely of entering into transactions which would merely result in differences, and when the supposed trader never intends to get possession or control of any commodity, so that he may have the disposal of it. Although I do not say it is impossible to have a trade or adventure of that nature, I think it is a fact to be taken into account.

Now the first question is whether or not the appellant, on the footing that he was entering into real transactions for the purchase and sale of a commodity—namely, cotton—was or was not engaged in a trade or vocation, and that it seems to me must in the circumstances be a question of fact. Unfortunately or fortunately—I do not propose to express any moral judgment upon the point—one knows that a great

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number of persons whose ordinary life does not lie in the way of commerce do engage in speculations of this kind in commodities, and when a commodity is found which offers tempting fluctuations of price, so that there are good chances of a profit with equally good chances of a loss, one does find individuals from time to time coming into the market and making purely speculative purchases; and one knows that there have been, at any rate in one's own experience, three commodities in which that kind of speculation has been quite common at different times. One is cotton; another has been in the past, and may be in the present, copper; and another has been in the past and no doubt is in the present, rubber. There are no doubt laymen who do indulge in speculative purchases in these commodities, and they repeat those speculative purchases more than once, being probably buoyed up by their initial successes. Nevertheless, it seems to me still to be a question of fact whether the professional man, to quote an extreme case, who makes purchases of that kind, and makes more than one of them in a year, can be said to be engaged in a trade or vocation in the course of these purchases. I should think it would probably be a question of degree. Now if it is a question of degree, it must be a question of fact, and there is no tribunal more competent to deal with that question of fact than the Special Commissioners. But whether they are competent or not the point is that the Legislature has confided to them, and to them alone, the duty of determining that question of fact, and the Courts of law have no jurisdiction to deal with the matter at all. Their jurisdiction is confined to the question of law. Of course, in all these matters there may be a state of facts which can only lead to one conclusion of law, but when it is, as I have said, a question of degree, it seems to me it must necessarily be a question of fact. In this connection I should like to cite two passages from *Currie* v. *Inland Revenue Commissioners* (1), which was cited to the learned judge in the Court below and also to us. There the question was whether a person who made it his business to advise as to

(1) [1921] 2 K. B. 332.

income tax recovery and carried on a business as "The Income Taxpayers' Appeal Agency" was or was not carrying on a "profession" within the exception (*c*) to s. 39 of the Finance (No. 2) Act, 1915, so as to exempt him from assessment to excess profits duty. The Special Commissioners found he was not. That is not quite this case; it is rather a stronger case giving rise to possibilities of law, because there is no doubt there are certain elements of a profession which would perhaps be decided as part of the definition as a matter of law. But Lord Sterndale says (1) it may depend upon circumstances: "There may be circumstances in which nobody could arrive at any other conclusion than that what the man was doing was carrying on a profession. . . . . That reduces it to a question of law. On the other hand, there may be facts on which the direction would have to be given the other way. But between those two extremes there is a very large tract of country in which the matter becomes a question of degree; and where that is the case the question is undoubtedly, in my opinion, one of fact; and if the Commissioners come to a conclusion of fact without having applied any wrong principle, then their decision is final upon the matter." There is one further passage in Scrutton L.J.'s judgment in which he discusses the question of whether the business carried on by this man was a profession, and instanced the case of a photographer. He says (2): "Art is a matter of degree, and to determine whether an artist is a professional man again depends, in my view, on the degree of artistic work that he is doing. All these cases which involve questions of degree seem to me to be eminently questions of fact, which the Legislature has thought fit to entrust to the Commissioners, who have, at any rate, from their very varied experience, at least as much knowledge, if not considerably more, of the various modes of carrying on trade than any judge on the bench."

Now in this case the Commissioners without, so far as I can see, applying any wrong principle, taking in their consideration the question of habitual and systematic operations, which I

(1) [1921] 2 K. B. 336. (2) Ibid. 341.

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think are indisputably relevant to the question of whether a man is carrying on a trade or not, come to the conclusion that the operations in this case are not so habitual and not so systematic as that the person can be properly said to be carrying on a trade in those particular transactions. As it appears to me that this is an inference of fact pure and simple, their finding must I think stand, and therefore it is immaterial what view I or any judge on the bench takes of the matter. I am not saying that I agree with them, because that is irrelevant. It may very well be if one were left to oneself one would find with regard to these transactions that there was a vocation of speculating in these futures, or it may be a trade, but I have not formed a definite view at all about it, and I think that the Commissioners' view on this matter must stand as a finding of fact.

That, however, does not dispose of the matter, because the other question arises under para. 1 of Sch. D, which has been referred to, and which provides: "Tax under this Schedule shall be charged in respect of—(*a*) The annual profits and gains arising or accruing—(i.) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and (ii.) to any person residing in the United Kingdom, from any trade, profession, employment or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; and (iii.) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment or vocation exercised within the United Kingdom; and (*b*) All interest of money, annuities, and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax." The profits and gains referred to in the last clause must include, therefore, profits and gains which are not derived from any kind of property whatever and are not derived from any trade, profession, employment or vocation exercised within the United Kingdom. They are something wider and larger than that. Now what is there to prevent the profits arising from

these transactions being annual profits or gains? The Commissioners in this respect seem to me to have gone wrong in law. They have held that these transactions were gambling transactions, by which they must have meant what I have been discussing already, wagering transactions, and on that they were wrong. It appears to me that their view must be taken to be this, that they would be annual profits or gains if it were not that they were wagering transactions, and therefore in their view not chargeable; but whether that is so or not it appears to me that in this case there can be only one inference which can be drawn in respect of them, and that is that the profits arising from them were annual profits or gains. For that purpose no doubt you have to consider not merely whether they are profits or gains. For my part I can see no reason to doubt that they are profits or gains. I do not think that that can be disputed. They arise from having made a real contract which gives you rights, and then, taking advantage of that contract, selling the commodity, or the right which you have acquired by contract to have delivery of that commodity, either to the person who made the contract or to somebody else; it does not matter; you make a gain. There is no doubt that speculations in commodities of this kind are just like speculations in shares. They may under some circumstances be such that you could not reasonably call the profit made an annual profit or gain. It may very well be that transactions may be so carried out as to be nothing but in the nature of temporary investments repeated several times over, and resulting in something in the nature of capital accretions which could not be brought within the title or meaning of "annual profit or gain," which to my mind must mean something which is of the nature of revenue or income, although I also think it is plain that it need not be repeated every year so as to be a continuous source of income. It may come in only as income or revenue in the one year, but still it has to be in the nature of annual profit or gain. In this case you have to look at the facts, and when you do so you find that the appellant has been making these profits or gains, not by investing his capital, because he never

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invested any money in the matter, but by making executory contracts which he closed by other executory contracts. He invested no money as such in the matter at all. But we have figures in the schedule to the case which show that the appellant has been entering into these transactions every year from 1915 to 1922; that is, for eight years running he has been in receipt of money from these transactions; I was going to say in receipt of revenue, but that perhaps begs the question, but it appears to me to be really expressive of the true facts. He has had an annual revenue from these transactions throughout the whole of this period.

Under these circumstances, it appears to me, there can be but one conclusion from the facts. I think the Commissioners meant to find it apart from the question of gambling, but whether they did or not, it seems to me the true view is that here there were annual profits or gains, and that these ought to be brought into charge. Therefore I think that the assessment is properly made.

Like my Brother Warrington I desire to reserve the question of what the position would be if these transactions had turned out to be bets; but if the bets had been proved to be as continuous as these particular bets were, I express no opinion about it. I suppose the matter may some day arise in the Courts.

For these reasons I think the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Pritchard, Englefield & Co., for Forwood, Williams & Co., Liverpool.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

W. I. C.

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July 23, 24.

Mines—Coal Mine—Safety—Withdrawal of Men—Readmission to fight Fire—Supervening Accumulation of inflammable Gas—Duty to withdraw Men—Coal Mines Act, 1911 (1 & 2 *Geo.* 5, c. 50), *ss.* 67, 75.

By s. 67, sub-s. 1, of the Coal Mines Act, 1911, it is provided that if it is found that by reason of inflammable gases or of any cause whatever a mine is dangerous, every workman shall be withdrawn, and a competent person duly authorized shall inspect the mine, and a workman shall not, except for inquiring into or removing the cause of danger, be readmitted into the mine until the same is reported not to be dangerous. By sub-s. 2 a place is deemed to be dangerous if the percentage of inflammable gas in the general body of the air in that place be two and a half or upwards.

Fire having broken out in a coal mine all the men were withdrawn. They were readmitted, not for the purpose of inquiring into or removing a danger from gas, but solely for the purpose of dealing with the danger from fire, although no report had been made that the mine was not dangerous. As a result of their operations for that purpose, which interfered with the ventilation, inflammable gas accumulated to a greater percentage than two and a half. The men, nevertheless, were not withdrawn; an explosion occurred, and men were killed:—

Held, that s. 67 applied, although the men were not engaged in their normal occupation of getting coal, and were engaged in dealing with a danger within the meaning of the section—namely, that caused by fire—and that the men, on the above percentage of gas having been found, ought to have been withdrawn.

CASE stated by justices of the West Riding of Yorkshire.

On May 28, 1924, four informations were laid by the appellant, James Edward Wing, acting as solicitor to Frederick Horton Wynne, an inspector of mines, against the respondent, Basil Henry Pickering, the agent of the Maltby Main Coal Mine, in respect of alleged offences committed contrary to s. 67 of the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50) (1), on July 27 and 28, 1923. It was alleged that the respondent, under the provisions of s. 75 (1) was guilty under s. 67 (1) in that the persons for the time being in charge of

(1) The Coal Mines Act, 1911, s. 67, sub-s. 1: "If at any time it is found by the person for the time being in charge of the mine, or any part thereof, that, by reason of the prevalence of inflammable or noxious gases, or of any cause whatever, the mine or any place in the mine is dangerous, every workman shall be withdrawn from the mine or place found dangerous, and a fireman, examiner, or deputy, or other competent person authorised by the manager or under-manager for the

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a certain part of the Maltby Main Coal Mine, having found that such part was, by reason of the prevalence of inflammable gas, dangerous, had failed to cause all workmen to be withdrawn from the part so found to be dangerous, and permitted workmen to be readmitted into such part so being dangerous, and that the respondent, as agent of the mine, was therefore guilty. The informations were, by consent, heard together.

The following facts were proved or admitted:—

The Maltby Main Coal Mine is a mine to which the Coal Mines Act, 1911, applied at all material times, and the respondent was the agent of the mine. The mine is a gaseous one, and is not allowed to be worked with naked lights, and the maintenance of a sufficient current of air is essential to prevent the accumulation of inflammable gas to a dangerous extent. In April, 1923, indications of fire in the low east district of the mine were observed, and continued during May,

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purpose shall inspect the mine or place found dangerous, and, if the danger arises from inflammable gas, shall inspect the mine or place with a locked safety lamp, and in every case shall make a full and accurate report of the condition of the mine or place; and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, or for exploration, be readmitted into the mine or place found dangerous, until the same is reported by the fireman, examiner, or deputy not to be dangerous."

Sub-s. 2: "For the purposes of this section, a place shall be deemed to be dangerous if the percentage of inflammable gas in the general body of the air in that place is found to be two and a half or upwards, or, if situate in a part of a mine worked with naked lights, one and one quarter or upwards."

Sect. 75: "Any person who contravenes or does not comply with any of the provisions of this Part of this Act [which includes s. 67] shall be guilty of an offence against this Act, and, in the event of any contravention of or non-compliance with any of the provisions of this Part of this Act by any person whomsoever, the owner, agent, and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means by publishing and to the best of his power enforcing those provisions to prevent that contravention or non-compliance."

Sect. 102, sub-s. 3: "Nothing in this Act shall render the owner, agent, or manager of a mine liable to a penalty in respect of any contravention of or non-compliance with the provisions of this Act, if he proves that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision."

June and July, 1923. On July 16 serious explosions of inflammable gas occurred, and on July 17, in view of the risk of further explosions all men were withdrawn from the mine, and thereafter up to July 28, 1923, no men were employed in the mine for the purpose of coal getting, and the operations carried on in the mine were solely with a view to damming off and extinguishing the fire. After the explosion of July 16 the mine was inspected by the respondent and other officials and representatives of the workmen, and on July 22 it was decided by them to extinguish the fire by sealing up the part of the mine affected, by the erection of stoppings at certain places, and then by injecting under pressure inert gas into the affected area through a pipe built into one of the stoppings. On July 22 and 23 the respondent issued written directions to those engaged in the operation. Thereafter men were readmitted in different shifts to the mine, for the purpose only of the erection of the stoppings, up to July 28, 1923, the men so working being volunteers.

The erection of these stoppings, if no steps were taken to maintain adequate ventilation by means of a sufficient current of air, would, to the knowledge of the respondent and all parties concerned, operate to reduce the necessary current of air ventilating the parts of the mine in which the men were so engaged, and the erection of the stoppings would tend to cause or permit accumulations there of inflammable gas.

On July 27 and 28 there were in the general body of the air where the men were working accumulations of inflammable gas in excess of $2\frac{1}{2}$ per cent. No instructions were given by the respondent or any other official that the men were to be withdrawn, or that any particular course was to be taken in the event of the percentage of inflammable gas exceeding $2\frac{1}{2}$ per cent. being found, and the respondent admitted that he would not have withdrawn the men until the percentage exceeded $3\frac{1}{2}$ to 4 per cent. In fact that percentage varied from $2\frac{1}{2}$ to 6 per cent., but while the respondent was aware at all material times that the percentage was $2\frac{1}{2}$ per cent. and upwards, it never came to his knowledge, previous to the explosion on July 28, that there was at any time a higher

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percentage than 3 per cent. Reports under the Mines Act were made, and copies attached to the case, but no report was made that the mine was not dangerous.

On July 28, 1923, a violent explosion occurred in the part of the mine where the men were working, and twenty-seven of them were killed.

It was contended for the appellant that upon its being found that the percentage of inflammable gas was 2½ per cent. and upwards the men ought to have been withdrawn, and could not lawfully be readmitted except in so far as was necessary for the removal of the danger caused by excess of inflammable gas, and that the men were never so withdrawn and were not readmitted for the removal of the danger from gas, but solely with a view to deal with the fire.

On behalf of the respondent it was contended that the fire was a cause of danger within the meaning of the words "of any cause whatever" in s. 67 of the Act (1): that the workmen were withdrawn from the place so found dangerous, and were only readmitted for the removal of that cause of danger; that the inevitable result of dealing with the fire must be to interfere with the ventilation; that it was impossible to regard the danger from the gas and that from the fire as two separate dangers, but that they were so connected that in fighting the fire the men were also fighting the danger from the gas; and that the men were properly readmitted to deal with this danger under the excepting words of s. 67. (1) The respondent also relied on reg. 9 (ii.) in Part II. of the General Regulations dated July 30, 1920 (1920. No. 1423). And he further relied on the defences given by s. 75 (1) and s. 102, sub-s. 3, of the Act. (1) The appellant contended that there was no evidence to support these last-named defences.

The justices delivered a written judgment (set out in the case) dismissing the informations, on the ground that s. 67 deals with a mine when being normally worked; that the men were readmitted to deal with a danger—namely, that from fire—within the meaning of the section, and that the prohibition thereupon no longer applied; and that the

(1) See note (1) ante, p. 777.

Legislature had left it to the discretion of those concerned to provide as far as possible for the safety of the men engaged.

The appellant being dissatisfied with this decision the justices, on his application, stated this case.

Sir Douglas Hogg A.-G., *C. F. Lowenthal* and *H. I. P. Hallett* for the appellant. On the true construction of s. 67 of the Coal Mines Act, 1911 (1), it is a mistake to suppose that once a fire has broken out the section becomes inoperative. The men were never withdrawn in consequence of the presence of inflammable gas, and they could only lawfully be readmitted to remove the danger caused by the gas. But it is found in the case that they were admitted solely to deal with the fire, not with the gas. Inflammable gas was present in quantities sufficient to make this place in the mine dangerous within the meaning of s. 67, sub-s. 2, and the moment that fact was established the provisions of the section became operative, and the men should have been withdrawn. When a mine becomes dangerous within the meaning of the sub-section it is immaterial whether the men are working in the normal manner to gain coal or are working to remove a danger within the meaning of the section; if the mine becomes dangerous through inflammable gas, the section applies. No doubt it may be difficult at times to decide upon the proper conduct to pursue, but that cannot affect the interpretation of the section, and in this case all the conditions obtained which brought the section into operation.

Rabagliati (*Sir H. Maddocks K.C.* with him) for the respondent. The men were admitted for the purpose of stopping the fire, and the fire was a "cause of danger," and the stopping of the fire was a "removal thereof" within the meaning of s. 67, sub-s. 1, of the Act. Sect. 67 gives the right to readmit men for the purpose of fighting danger who, but for the section, could not lawfully be readmitted. The danger from fire and the danger from gas were not two separate dangers, for the accumulation of gas was caused by the interference with ventilation occasioned by the necessary methods

(1) See note (1) ante, p. 777.

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adopted for dealing with the fire. In dealing with the one danger the men were necessarily incurring the other.

The respondent is entitled to the protection afforded by s. 75 of the Act (1), which makes it a defence to show that the agent (the respondent) had taken all reasonable means to prevent the contravention of the Act, or to that afforded by s. 102, sub-s. 3. (1)

LORD HEWART C.J. This is a case stated by justices for the West Riding of Yorkshire sitting at Doncaster. The question arises out of four informations which were laid against the present respondent by the present appellant acting on behalf of one of His Majesty's inspectors of mines. Those informations had to do with offences under s. 75 of the Coal Mines Act, 1911, consisting of breaches of s. 67 of that Act on July 27 and 28, 1923, it being alleged that the respondent, as agent of the mine, had been guilty under the provisions of s. 75, in that persons for the time being in charge of a certain part of the Maltby Main Coal Mine, having found that a part of the mine was, by reason of the prevalence of inflammable gas, dangerous, had failed to cause all workmen to be withdrawn from the part so found to be dangerous and had also permitted workmen to be readmitted into the part so being dangerous.

It is not necessary to repeat the facts, but it may be convenient to read once more ss. 67 and 75 of the Act of 1911. Both of those sections are to be found in Part II. of the Act, which is the part concerned with provisions as to safety. That part begins with s. 29 relating to the standard of ventilation, and it concludes with a series of miscellaneous provisions ending at s. 75. Now s. 67, sub-s. 1, is in the following terms. [His Lordship read s. 67 (1):] Those are the provisions, and most important provisions of s. 67. Sect. 75 is concerned with penalties. It provides: [His Lordship read it:] (1)

The facts of the case so far as it is necessary to reiterate them are shortly these. The coal mine referred to is admittedly a mine to which the Act of 1911 applies, and

(1) See note (1) ante, p. 777.

the respondent at the material time was the agent of the mine within the meaning of that Act. The mine is a gaseous mine, and is not allowed to be worked with naked lights, and the case finds as a fact that the maintenance of a sufficient current of air is essential to prevent the accumulation of inflammable gas to a dangerous extent. In the month of April, 1923, there were indications of fire in one of the eight districts of the mine, and the management took steps to deal with the matter. Indications of fire, however, continued to occur in that district during May, June and July, 1923. On July 16, 1923, there were serious explosions of inflammable gas in that district, and accordingly on July 17, by reason of the risk of further explosions, all men were withdrawn from the mine. Then the case adds this important sentence: "Thereafter up to the happening of the serious explosion on July 28, 1923, hereinafter referred to, no men were employed in the mine for the purpose of coal getting, and the operations carried on in the mine were solely with a view to damming off and extinguishing the fire." That is a sentence entirely free from ambiguity. It leaves no doubt and no possibility of doubt that the operations from that day forward carried on in the mine were "solely with a view to damming off and extinguishing the fire." After July 16 there was an inspection of the mine, and on July 22 there followed a conference, and at that conference it was decided to attempt to extinguish the fire by isolating and sealing up the part of the mine affected by fire. The particular method which was selected was the familar method of the erection of stoppings at certain places and the injection of inert gas into the affected area through an aperture made in one of the stoppings. That plan having been determined upon, on July 22 and on each following day and each following night workmen were re-admitted to the mine for the purpose, and for the purpose only, as is again expressly stated in the case, of proceeding with the erection of the stoppings with a view to damming off the fire. That work was continued by alternating day shifts and night shifts up to the morning of July 28. A large number of men was employed upon this work. On July 27,

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the day before the explosion, no fewer than 108 men were so employed in the morning, 82 men in the afternoon, and 120 at night; and on July 28 in the morning 122 men were so employed. Those men were employed upon the laborious task of erecting these stoppings and damming up the fire. Now on July 27 and 28 there were in the places in which the men were working in connection with two stoppings accumulations of inflammable gas in excess of 2½ per cent. "No instructions"—says the case—"were given by the respondent or any other official that the men were to be withdrawn or that any particular course was to be taken in the event of the percentage of inflammable gas exceeding 2½ per cent. being found." Moreover, the respondent in his evidence admitted that he would not have withdrawn the men until the percentage of inflammable gas exceeded 3½ to 4 per cent. Perhaps I ought now to read the following paragraph of the case in full: "It was not in dispute that during the day and night of July 27 and on July 28 up to the happening of the explosion the persons for the time being in charge of the part of the mine where the workmen were engaged in connection with stoppings A1 and A2, from time to time found the percentage of inflammable gas in the general body of the air in that part of the mine to be 2½ per cent. and upwards, and that notwithstanding this fact the workmen so engaged in that part of the mine were not withdrawn therefrom, and at the conclusion of each shift the next shift of workmen were admitted thereto. In fact the percentage of inflammable gas varied from 2½ to 6 per cent., but while the respondent was aware at all material times that the percentage of inflammable gas in the general body of the air in the material parts of the mine was 2½ per cent. and upwards it never came to the respondent's knowledge prior to the explosion of July 28 that there was at any time a higher percentage than 3 per cent. Reports under the Mines Act were duly made by the persons in charge of the said part of the mine, showing among other things the extent of the percentage of inflammable gas, and a bundle of copies of such reports relating to the afternoon and night of July 27 and

morning of July 28 and marked F are hereto annexed." Those reports show an accumulation of carburetted hydrogen or fire damp, as it is called, ranging from $3\frac{1}{2}$ per cent. to 6 per cent. The paragraph goes on: "No report was ever made by the fireman, examiner or deputy prior to the admission from time to time of the different shifts of workmen on July 27 and 28 to the said part of the mine that such part of the mine was not dangerous." On July 28 at a quarter past nine in the morning a violent explosion of inflammable gas occurred in the neighbourhood of the stoppings A1 and A2, entirely wrecking that part of the mine, and causing the death of twenty-seven workmen.

In those circumstances it was contended on behalf of the present appellant that the respondent under ss. 67 and 75 of the Act had been guilty of an offence, because under s. 67 the men ought to have been withdrawn from that part of the mine upon its being found that the percentage of inflammable gas in the general body of the air in that part of the mine was $2\frac{1}{2}$ per cent. and upwards, and could not lawfully be readmitted thereto except in so far as was necessary for the removal of the danger caused by the excess of inflammable gas, and that the men were never withdrawn upon the excess of inflammable gas being found and were not readmitted for removal of that particular danger, but solely in order to deal with the fire. On the other hand it was contended by the respondent that the fire was a cause of danger within the meaning of s. 67, that the workmen were withdrawn from the place found dangerous, and were readmitted only for the removal of that cause of danger. Then the contention went on that the existence of gas in excess of $2\frac{1}{2}$ per cent. was known to all at the time of readmission; that the inevitable result of dealing with the fire must be to interfere with the ventilation; that it was impossible to regard the danger from the inflammable gas and the danger from fire as two separate dangers, but that they were so connected that in fighting the fire the men were also fighting the danger from inflammable gas; and that the men were properly readmitted to deal with this danger under the excepting words of the

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section. The respondent also relied upon reg. 9 in Part II. of the General Regulations dated July 30, 1920 (1920. No. 1423), headed: "Precautions against spontaneous combustion of coal." It was further contended on the part of the respondent that if there had been a contravention or non-compliance nevertheless he was protected by s. 75, or, alternatively, by s. 102, sub-s. 3, which makes it a good defence to show that the contravention or non-compliance was due to causes over which he had no control and against the happening of which it was impracticable for him to make provision. With regard to that final contention of the respondent the appellant replied that there was no evidence to bring the respondent's case within the exception contained in s. 75, or within sub-s. 3 of s. 102, and that on the contrary the admission made by the respondent that he would not have withdrawn the men until the percentage of inflammable gas reached $3\frac{1}{2}$ to 4 per cent., and the other facts of the case established that he was not entitled to be relieved from liability under either of the said sections.

Those being the facts and those being the contentions, the justices thought it right to put their judgment into writing, and it is textually before us. No doubt it is difficult in particular circumstances to give full effect to some of the provisions of this Act. It is easy to imagine circumstances in which a conflict of opinion might arise as to what was best to be done or what among various things was best to be done first. Those difficulties may be frankly recognized. It is a totally different thing to say that because a difficulty or a combination of difficulties is found to exist the Act, or an important part of the Act, becomes of no effect and is, so to say, blotted out, and that everything is left, not to the performance of a statutory obligation, but to the prudent exercise of a managerial discretion. The importance of this case in my opinion consists in this fact: that to say the least there are passages in the considered and written judgment of these justices which are capable of bearing the meaning that in such a set of difficulties as arose at this time in this mine portions of this Act were pro tanto suspended

and ceased to be in operation. If that were indeed the true conclusion, it is tolerably obvious, as has been said, that the matter would call for the early attention of the Legislature.

The justices begin the portion of their judgment which deals with the law by getting rid, if I may use that expression, of s. 29. They say: "Dealing first with s. 29 our opinion is that that section is of no assistance to us at all in the circumstances of this case. It is, in our opinion, a general section dealing with the safety of the mine when being worked as a coal mine under normal conditions." They go on to say that when men have been readmitted under s. 67 "the Legislature have, in our opinion, left it to the discretion of those concerned to provide as far as possible for the safety of the men engaged. In dealing with any danger in a mine the risk is great, and is known to all, and it must not be forgotten that the men who were readmitted were all volunteers and probably knew well that they were running a risk of their lives: that is characteristic of miners." What is the precise meaning to be attached to that last sentence I confess it is difficult for me to understand. The justices go on to say: "We are unable in the case before us to take the view that there were in fact two separate dangers"; and they add this sentence: "Even if the two dangers are to be regarded as separate dangers, one supervening as the result of dealing with the other, we are nevertheless of the opinion that the prohibition contained in s. 67 does not apply to men readmitted under the exception." Holding those views the justices came to the conclusion that the summonses against the respondent ought to be dismissed, not because of the defences afforded in a suitable case by s. 75, nor because of the defence afforded by s. 102, sub-s. 3, but quite independently of those two sections and upon the ground that the prosecution had failed to establish a case.

In my opinion the justices in so holding made an error in law. It is not correct to say that when events of this kind happen any part of this Act goes by the board and may be neglected. The Act remains in full force and effect, and

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if the circumstances are such that steps which otherwise ought to be taken and would be taken cannot be taken, that state of facts may in a proper case afford a defence under one of the sections already referred to. But it is quite clear that there is all the difference in the world between saying that the part of the Act which imposes an obligation has for the time being disappeared and saying: I recognize that the statutory obligation remains and I did my best to fulfil it, but circumstances were too much for me.

Some argument has been addressed to the question whether, in the particular events which happened here, there was in truth one danger or there were two separate dangers. One thing at any rate is made abundantly plain by repeated passages in that part of the case stated which is dealing with the facts—namely, that these men who went down into the mine on July 27 and 28, 1923, went there for the sole purpose of damming up the fire. They went there in such numbers and with such equipment and under such instructions as were suitable to that task; and they went to the particular spot in the place in the district where that task might best be performed. The case makes it perfectly clear that all the plans, all the schemes that were adopted and carried out, were conceived for the purpose and directed to the purpose of damming up the fire in the waste place. There never came a moment when those men or any of them were re-admitted into the mine after withdrawal for the purpose of dealing with the inflammable gas and removing if possible the cause of that menacing accumulation of inflammable gas. If that had been the purpose which dictated the plans of the management and the men it needs very little knowledge or imagination to perceive that a very different number of men might have been sent with a very different equipment, and, it may be, to a very different spot. Nowhere does it appear in this case that the purpose of any of these men upon readmission was to explore or to remove the accumulation of inflammable gas. The case really comes to this, that, a fire having been discovered, men are sent down to deal with the fire. A new and separate cause of danger supervenes,

grave in itself, and still more grave in a district of a mine where there is already fire. When that accumulation was found, what was the statutory duty? In my opinion it clearly was to remove the men, to withdraw the men, and then the question would have arisen, what was the better course: to endeavour to deal with this accumulation of inflammable gas, or to resume in some carefully considered way the damming up of the fire? If that question had been dealt with it may well be that it would first of all have appeared desirable to deal with the accumulation of the inflammable gas and then to proceed with the damming up of the fire. But what seems to me to be an intolerable view is that if men are admitted for the purpose of damming up the fire, all other directions are ipso facto thrown to the winds, and if any other cause of danger arises, whether it be an accumulation of gas or an inrush of water, or whatever else it may be, there is a tabula rasa—the slate cleaned of all obligations by the mere circumstance that the men have been admitted for the purpose of dealing with a danger. That seems to me to be a view of this Act which is no less repugnant to common sense than it is to the phrasing of the Act itself. No doubt it is possible to spin ingenious puzzles as to what is to be done in particular circumstances. No doubt, especially if controversy arises, it is easy to say that if there is fire, and if there supervenes an accumulation of inflammable gas, there is a dilemma, and whatever course the management takes it may be said to be wrong. That is a totally different thing from saying that these obligations are superseded and that the statutory duty is overridden. It is said that the task of ventilation, if it had been approached as a main task, was not merely possible but easy. How that may be I do not know, but upon these materials it is, I think, abundantly clear that these summonses ought not to have been dismissed for any such reasons as those for which they were dismissed. Whether there is a defence open to the respondent under s. 75 or under s. 102, sub-s. 3, is a question upon which it is not useful to enter at this stage. I am bound to say, speaking for myself, that with regard to either of those defences, or any other

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defence, it appears to me to be a very remarkable fact that the respondent should have admitted, as appears by the case, that he would not have withdrawn the men until the percentage of inflammable gas reached 3½ to 4 per cent. However, I do not desire to utter any word which might have any effect when hereafter, or if hereafter, a defence under s. 75 or under s. 102, sub-s. 3, is raised. If and when those circumstances do arise the justices will deal with the evidence unfettered; but what is of importance is that no countenance at all should be given to the doctrine that in such an emergency as arose here vital portions of this Act, an Act of the most profound importance to every man engaged in mining, can in any sense whatever be either superseded or mitigated.

For these reasons I think that this appeal ought to be allowed, and the case ought to go back to the justices.

AVORY J. I have arrived at the same conclusion with considerable hesitation, because I feel the force of the dilemma which is expressed in this judgment of the justices. If the terms of s. 67 are literally to be enforced, they say, what is the logical result when you have in a mine both a danger from fire and also a danger from inflammable gas? You will be unable to readmit men to deal with the gas because of the existence of the fire, and, similarly, you will be unable to readmit men to deal with the fire because of the gas. But I find it quite impossible to escape from the conclusion that, upon the facts of this case, on July 27 and 28, the place in the mine where the men were working was dangerous by reason of the prevalence of inflammable gases. The moment that is established as a fact there is a positive obligation imposed by the Act to withdraw the workmen from the place which is found dangerous. That undoubtedly was not done and, therefore, there was prima facie a breach of the terms of this section. Similarly with regard to the readmission of the men. The section provides that a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, be readmitted into the mine or place found dangerous until the same is reported

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by the fireman, examiner or deputy not to be dangerous. It is admitted upon the facts in this case that assuming the men were admitted for the removal of the cause of danger—namely, the fire—leaving out of consideration the question whether they ought to have been readmitted at all under the circumstances—it is clear that they were readmitted before there was any report by the fireman, examiner or deputy, that the place was not dangerous. So that technically there appears undoubtedly to have been a breach of the terms of this section, and the justices I think in their judgment were wrong in these passages. They say: "When, therefore, you have, as in the case before us, a condition of affairs in which there exists at the same time . . . . a fire and also a prevalence of inflammable gas, does the section prohibit you dealing with the fire until you have succeeded in reducing the gas to $2\frac{1}{2}$ per cent.? In our opinion it does not. The section, in our opinion, was intended to apply to a mine being normally worked as a mine." I am quite unable to follow that, because it is obvious that the section is dealing with a state of things when the mine is not being normally worked, and it seems to me, in view of the provision that a place shall be deemed to be dangerous when the percentage of inflammable gas is found to be $2\frac{1}{2}$ per cent. or upwards, that it is impossible to say that the section does not prohibit the dealing with any particular cause of damage until the management have succeeded in reducing the gas to $2\frac{1}{2}$ per cent. On the other hand, it seems to me clear that it does prohibit anything being done in that place in the mine until the inflammable or noxious gases are reduced to $2\frac{1}{2}$ per cent.

I also agree with my Lord that the justices were wrong when they said: "When men have been readmitted under the section the Legislature have, in our opinion, left it to the discretion of those concerned to provide as far as possible for the safety of the men engaged." It is not accurate to say that the Legislature has left it to the discretion of those concerned to provide as far as possible for the safety of the men engaged. The Legislature has in terms provided for the safety by enacting that the men are not to work there

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so long as the percentage of inflammable gas is above 2½ per cent.

With reference to the provisions of s. 75 and s. 102, sub-s. 3, I desire to say nothing which can in any way prejudice the defences which are open to the respondent in this case under those sections. That matter is entirely open for consideration. We have not before us the materials, and certainly if we had it is not proper for us at this stage to express any opinion upon the question whether the respondent has any sufficient answer under either of those sections to these charges.

I agree, on the grounds stated, that the appeal should be allowed.

SHEARMAN J. I am of the same opinion. In my judgment this case must go back to the justices with the intimation that they should convict the respondent for not withdrawing the men after it was found that by reason of the prevalence of inflammable gas this place in the mine was dangerous. I think it is quite clear on the evidence that it was so found by 12 o'clock midnight on July 27. That does not seem to be disputed. But, of course, the case goes back to the justices with the intimation that they must convict unless the respondent establishes a defence under s. 75 or s. 102, sub-s. 3. The facts relating to such a defence have not been argued before us, and I express no opinion thereon. Although I have arrived at a clear conclusion, I desire to say that I think this case is full of difficulty, and it has been a great consolation to me to know that it has been fully and ably argued on both sides. I think the determination of it rests upon the finding of the justices, that the men who were then working in the mine had been readmitted to the mine "solely with a view to damming off and extinguishing the fire."

The short facts in this case are that there was an explosion in the mine on July 16; the men were immediately withdrawn under reg. 9 (ii.) of the General Regulations, dated July 30, 1920 (1920. No. 1423), which says: "When the existence of a fire has been definitely ascertained every workman, except those engaged in combating the fire, shall be withdrawn

from the seam." That means that every one has to be withdrawn unless he is engaged in combating a fire. From that time until early in the morning of July 28 all the workmen there were engaged in the mine for no other purpose than in combating the fire. While combating the fire, apparently during the whole of the time or for a long period, there was a breach of the provisions of s. 67. It is said for the respondent that there had been a breach and that the workmen knew it and everybody knew it; that this had been going on for some time and that the workmen had volunteered to work in spite of the breach. I can understand those matters being brought before the justices, because in the distressing circumstances of a case like this naturally every witness would want to show that there was as little moral blame as possible attributable to him, whether there had been a breach of the regulations or not. But even assuming all these facts and that a breach had been committed with the consent of all parties, the fact that the workmen agreed or that other people agreed does not alter the true effect of the provisions of the Act. In my judgment the obligation under s. 67, which is the section dealing, not with normal working, but with cases of danger, is an absolute obligation. The section says: "If at any time it is found . . . . that, by reason of the prevalence of inflammable or noxious gases, or of any cause whatever, the mine . . . . is dangerous . . . . every workman shall be withdrawn." And it provides that as soon as it is found—that is to say as soon as it comes to the knowledge of the person for the time being in charge of the mine—that there is inflammable gas in the general body of the air to the amount of $2\frac{1}{2}$ per cent. or upwards, the place is dangerous. I think it follows, however difficult it may be, that if there is a fire and you deal with the fire you cannot go on working to put out that fire if it is at a place in the mine where the percentage of inflammable gas exceeds $2\frac{1}{2}$ or upwards. The magistrates said that the thing could not be worked in that way. If that be so the law may have to be altered. But we have to administer the law as it is. In my judgment reg. 9 (ii.) of the General Regulations,

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as to what can be done in the case of fire co-exists side by side with the provisions of s. 67. Thereupon the fact remains that men were admitted properly to combat a fire: but the moment there became another supervening obligation to remove the men for another cause they ought to have been removed: they were not removed, and, therefore, prima facie there is an offence from which the respondent can only escape by proving a defence under ss. 75 and 102, sub-s. 3. For those reasons I think this appeal must be allowed.

Appeal allowed.

Solicitor for appellant: *Director of Public Prosecutions.*

Solicitors for respondent: *Peacock & Goddard, for Elliot, Smith & Co., Mansfield.*

W. L. L. B.

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July 28.

BARNARD *v.* EVANS.

Animals — Trespass — Cruelly Ill-treating—Shooting and Wounding — Unnecessary Suffering—Protection of Animals Act, 1911 (1 & 2 Geo. 5, c. 27), s. 1.

An information was laid under the Protection of Animals Act, 1911, s. 1, that the respondent had cruelly ill-treated a dog, which was trespassing, by shooting and wounding it. The justices found that the respondent shot at the dog with intent to kill, that substantial suffering was caused to the dog, and that it was not necessary to use a shot gun to drive it away. They were of opinion that on these facts it was not open to them to convict:—

Held, upon a case stated, that the only question to be considered was whether the shooting was necessary and that the justices should have convicted.

Powell v. *Knight* (1878) 42 J. P. 597 and *Hooker* v. *Gray* (1907) 71 J. P. 337 distinguished.

Per Avory J. The expression "cruelly ill-treat" applies where a person wilfully causes pain to an animal without justification.

Per Shearman J. The expression "cruelly ill-treat" means to "cause unnecessary suffering."

CASE stated by justices for the borough of Merthyr Tydfil.

Upon the information of the appellant, an inspector of the Royal Society for the Prevention of Cruelty to Animals, the respondent was charged under the Protection of Animals

Act, 1911 (1 & 2 Geo. 5, c. 27), s. 1, with cruelly ill-treating a dog on January 12, 1925, at Merthyr Tydfil by shooting at and wounding it contrary to the above statute.

The case stated showed that the respondent was a farm labourer in the employ of William Evans, a farmer. On January 12, 1925, a spaniel dog belonging to one Robert Evans went into a field in the occupation of the respondent's employer. The dog was playing with another dog, but it was alleged that when the respondent saw it, it was chasing fowls. The respondent had a gun and shot the dog, intending to kill it. The dog ran away for a short distance, then fell and crawled to its home. A number of shots penetrated its body and legs, causing flesh wounds, which were bleeding. The animal suffered, in consequence of the wounds, for some days. There was no hedge round the field, and no attempt was made by the respondent to drive the dog out of the field by other means before he shot at it. The respondent shot at the dog with intent to kill it by instructions of his master. The appellant contended that the shooting and wounding of the dog under the circumstances were not justifiable, because the dog was not doing any damage at the time; that the respondent used more force than was required to drive the dog away, and that the respondent caused it unnecessary pain and suffering. The respondent contended that he was justified in shooting the dog, which was trespassing on his master's property, and was chasing fowls.

The justices found that the respondent shot at the dog with intent to kill it; that as a result substantial suffering was caused to the dog, and that it was not necessary to use a shot gun to drive the animal out of the field. They dismissed the information, believing that they were bound to do so upon the authority of *Powell* v. *Knight* (1) and *Hooker* v. *Gray*. (2) They stated this case for the opinion of the High Court

Rayner Goddard K.C. and *F. J. Tucker* for the appellant. Upon the facts here appearing the justices should have

(1) 42 J. P. 597. (2) 71 J. P. 337.

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convicted. The true test is whether there was any necessity to shoot in order to drive away the dog, and the justices have here found that there was not. The law as to this is laid down in *Wright* v. *Ramscot* (1), where the cases are collected in a note by Mr. Serjt. Williams, and *Vere* v. *Lord Cawdor* (2), and it has never been altered. The justices dismissed this summons owing to a mistaken interpretation of *Powell* v. *Knight* (3), a case which was followed in *Hooker* v. *Gray*. (4) The summary of the decision in *Powell* v. *Knight* (3), given in Stone's Justices' Manual, 57th ed., p. 294, is misleading. There is a mistaken idea that it is in all circumstances lawful to shoot at a dog which is trespassing. In *Powell* v. *Knight* (3) Cockburn C.J. assumed in his judgment that the appellant was justified in shooting at the dog, but here the justices have negatived any such view in the statement of facts in the case. In *Miles* v. *Hutchings* (5) the charge was under the Malicious Damage Act, 1861, which bears no relation to the present Act. Perhaps the case most favourable to the respondent is *Armstrong* v. *Mitchell* (6), where it was held that shooting at a dog which is trespassing with the intention of frightening it away is not necessarily cruelly ill-treating it, and that each case is a question of degree, and is for the justices.

The respondent did not appear, but the point was taken on his behalf.

LORD HEWART L.C.J. I have no doubt that this appeal ought to succeed. The justices found that the respondent shot at the dog with intent to kill him, and that as the result of the shooting he was cruelly ill-treated, and that it was not necessary to use a shot gun to drive the dog away. In these circumstances the justices would have convicted, but they thought or they were induced to think that judicial decisions prevented them from so doing. The law in such a case is stated in *Vere* v. *Lord Cawdor* (7), where it is laid down, as

(1) (1666) 1 Saund. 84.
(2) (1809) 11 East, 568.
(3) 42 J. P. 597.
(4) 71 J. P. 337.
(5) [1903] 2 K. B. 714.
(6) (1903) 67 J. P. 329.
(7) 11 East, 568, 570.

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in many other cases, that the question is whether there was necessity for the shooting. Lord Ellenborough says in that case: "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground? And if there be any precedent of that sort, which outrages all reason and sense, it is of no authority to govern other cases. There is no question here as to the right to the game. The gamekeeper had no right to kill the plaintiff's dog for following it." It should be observed in that case that it had been argued by eminent counsel for the defendant that the justification need not allege that the killing was a necessary means of preserving the hare. That case decides that to shoot an animal in such circumstances without justification is to commit an offence.

Apparently undue stress was laid on the decision in *Hooker* v. *Gray* (1), which turned upon special facts, and was said to come within *Powell* v. *Knight* (2), where the question was not argued and decided, but assumed. A distinction is to be drawn between such a case and a case where the person is charged with unlawfully and maliciously destroying another's property. As was said by Channell J. in *Miles* v. *Hutchings* (3): "The existence of a malicious intention would be negatived if the appellant wrongly, but honestly, believed that it was necessary to shoot at the dog in order to drive him away; but while the justices have found that the shooting was unnecessary, they have found nothing as to the appellant's bona fide belief." In my opinion the justices were led by a true instinct when they desired to convict, and they were misled when they were induced to believe that there was any decision of this Court or any other Court which prevented them from so doing.

The case must go back to the justices with a direction to convict.

AVORY J. I am of the same opinion. I think the expression "cruelly ill-treat" applies to a case where a person wilfully

(1) 71 J. P. 337. (2) 42 J. P. 597.
(3) [1903] 2 K. B. 714, 717.

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causes pain to an animal without justification for so doing. In this case it is not proved, nor is it stated in the case, that the dog was in fact chasing fowls; it is only said that it was alleged that when the respondent saw it, it was chasing fowls. There is no distinct finding in the case that there was any necessity, even if it were chasing fowls, to resort to this extreme measure.

I agree that the case should be remitted with a direction to convict.

SHEARMAN J. I am of the same opinion. I think the case is of considerable importance, because the opinion has got abroad that if dogs are shot when trespassing, that does not come within the Protection of Animals Act, 1911, though it may come under other similar statutes. The Protection of Animals Act, 1911, s. 1 (*a*), under which this respondent was summoned, is directed against any person who "shall cruelly ill-treat," and it also goes on to say: "who shall by wantonly or unreasonably doing any act cause any unnecessary suffering." No doubt those offences are described a little differently. It appears to me that upon a summons under this first limb of the sub-section one has to consider what is cruelty. I do not think it can be better defined than as "causing unnecessary suffering." It is necessary in some operations to cause suffering. It seems to me that what the justices have to look at, when a man is charged with cruelly beating or ill-treating, is whether he is doing something which it was not reasonably necessary to do. They have found that the respondent was not justified in doing this act, and therefore he caused unnecessary suffering and did "cruelly ill-treat" this dog. The case must go back to the justices with a direction to convict.

Appeal allowed.

Solicitor for appellant: *S. G. Polhill.*

F. P. F.

[IN THE COURT OF CRIMINAL APPEAL.]

C. C. A.
1924
Dec. 1

THE KING *v.* THOMAS DWYER.

THE KING *v.* ALLEN FERGUSON.

Criminal Law—Evidence—Identification—Showing Photograph of suspected Person to identifying Witness—Practice.

It is permissible for a police officer who is in doubt upon the question who shall be arrested for a particular offence to show a photograph to persons in order to obtain information or a clue.

It is, however, not permissible for a police officer to show beforehand to persons who are afterwards to be called as identifying witnesses photographs of those persons whom they are about to be asked to identify.

Where photographs are used for the purpose of obtaining information a series of photographs, and not merely one or two, ought to be shown to the person who is expected to give the required information.

APPEAL from convictions.

The two appellants were convicted at Monmouth Assizes of breaking and entering a house and stealing rings, watches and other things. The appellant Dwyer was sentenced to six months' imprisonment with hard labour, and the appellant Ferguson was sentenced to fifteen months' imprisonment with hard labour.

On September 29, 1924, a Mrs. Williams left her house at 5.15 P.M. apparently safe. At about 7.45 P.M., when it was dark, the next door neighbour, Mrs. Jones, heard noises coming from the inside of Mrs. Williams's house. She also noticed a flashlight in the bedroom. She called another neighbour and a son-in-law of Mrs. Williams, who all went to the house of Mrs. Williams, and Mrs. Jones and the other two witnesses saw a man in a dark suit standing at the next door gate near an electrical standard, who was whistling. Mrs. Jones and her two companions went into the house, and as they were going in they saw a man in a brown suit come out and jump from an upstairs window. One of Mrs. Jones's companions came out of Mrs. Williams's house, and some time later in the evening he saw the man whom he had seen at the gate walking down the road.

C. C. A. 1924

REX v. THOMAS DWYER.

REX v. ALLEN FERGUSON.

The question at the trial was as to the identification of the two prisoners.

The witnesses for the prosecution, before identifying the prisoners, were shown two photographs of each of the prisoners, and these photographs showed the prisoners with a prison number upon their breast. These photographs were shown to the jury.

Ida Duncan for the appellants. The issue raised at the trial was as to the identification of the appellants. The ground of appeal is that the police, before the identification of the appellants took place, showed to the witnesses who were asked to identify them two photographs, full face and profile, of each of the appellants. These photographs were shown separately and not as part of a series. The identification therefore was thoroughly unsatisfactory: *Rex* v. *Goss*. (1) This case is distinguishable from *Rex* v. *Melany* (2), because the police, when they showed the photographs, were not in serious doubt as to who were the culprits. The witnesses were shown two photographs only of each man and not a series of photographs, and therefore the witnesses were not identifying the men but only the photographs. *Rex* v. *Chadwick* (3) shows that such an identification is unsatisfactory. Further, the photographs, which showed that each of the men had on his breast a ticket bearing a prison number, were deliberately shown to the jury, who thus were made aware that the men had been previously convicted. They were also produced by a policeman, who stated that they had been handed to him by the Cardiff City Police.

[She was stopped.]

Raglan Somerset for the Crown. The identification of the appellants did not depend upon the photographs alone. At the time the photographs were shown to the witnesses the appellants were not in custody, and they were shown in order to ascertain who were the persons to be arrested and not for the purpose of identification. In *Rex* v. *Goss* (1) the

(1) (1923) 17 Cr. App. R. 196. (2) (1924) 18 Cr. App. R. 2.
(3) (1917) 12 Cr. App. R. 247.

accused person was already in custody when the photographs were shown to the identifying witnesses, and they were shown the day before the identification. At the time the photographs were shown to the jury in the present case, counsel for the Crown was not aware of what was on them. The Crown do not desire to press this matter, but it is desirable that the Court should lay down rules as to whether the police can show photographs for the purpose of assisting the arrest of suspected persons. In *Rex* v. *Kingsland* (1) it was held that the police were justified in showing photographs of a person whom they suspected with a view of getting information.

The judgment of the Court (LORD HEWART C.J., SHEARMAN and SALTER JJ.) was delivered by

LORD HEWART C.J.: The question in this case was one of identity. The trial was satisfactory except in two respects, each of which was crucial. In the first place the witnesses who were to identify the prisoners, and who had seen them in the dark, had been shown extremely good photographs of the prisoners before they were invited to identify them. It is true, as Mr. Somerset has urged on behalf of the prosecution, that the police in showing those photographs to the persons who afterwards became witnesses were not intending to influence them in the task of identification or to equip them for it. On the contrary, the police officers were seeking only to ascertain who were the proper persons to be arrested. The fact remains, however, that the witnesses upon whose testimony the identification depended had seen very good photographs of each of the prisoners before the process of identification was formally entered upon. In the second place, during the trial photographs of the two prisoners were produced for the inspection of the jury and were inspected by the jury. Those photographs are now before the Court. There are two documents, each document containing two photographs. One document refers to one prisoner, the other document to the other prisoner, and there is shown with great clearness upon each of those documents a photograph,

(1) (1919) 14 Cr. App. R. 8.

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REX v. THOMAS DWYER. REX v. ALLEN FERGUSON.

full face and profile, of the prisoner referred to, and the prisoner is wearing upon his right breast a large ticket stamped with the prison number. These photographs having been handed to the jury, it was apparent to the jury that the prisoners had been previously convicted. It was just as clear a statement to the jury that the prisoners had been previously convicted as would have been sworn evidence to that effect. In those circumstances, counsel, who has urged the case for these appellants with so much clearness and force, says that these convictions cannot stand. In the opinion of this Court that is right. The appeals must be allowed and the convictions quashed.

The Court has been asked to formulate some principle relating to the use of photographs in the detection and punishment of crime. It is not possible, nor indeed would it be useful, to attempt hastily to enunciate a series of rules upon that matter. They are to be collected from the various cases which have been decided. But this observation may be added. The circumstances of different cases differ greatly, and it is not easy to lay down general rules. One distinction, however, is quite clear. It is one thing for a police officer, who is in doubt upon the question who shall be arrested, to show a photograph to persons in order to obtain information or a clue upon that question; it is another thing for a police officer to show beforehand to persons, who are afterwards to be called as identifying witnesses, photographs of those persons whom they are about to be asked to identify. It would be most improper to inform a witness beforehand, who was to be called as an identifying witness, by the process of making the features of the accused person familiar to him through a photograph. But even where photographs are employed for the purpose of obtaining information on the question of arrest, it is fair that all proper precautions should be observed. I shall not attempt to enumerate all possible contingencies, but it would be manifestly open to remark if, in a doubtful case, the police were to show one or two photographs to a person who was supposed to be able to give information and then, having obtained the

assent of that person, to act upon that information. The fair thing is, as was said in *Melany's* case (1), to show a series of photographs and to see whether the person who is expected to give information can pick out the appropriate person. And where that process has been gone through, no matter with what care, it is quite evident that afterwards the witness who has so acted in relation to a photograph is not a useful witness for the process of identification, or at any rate the evidence of that witness for the purpose of identification is to be taken subject to this, that he has previously seen a photograph. As I said, it is not easy, upon the spur of the moment, to formulate rules, but in this matter, as in all matters, as has so often been said in this Court, it is the duty of the police to behave with exemplary fairness, remembering always that the Crown has no interest in securing a conviction, but has an interest only in securing the conviction of the right person.

Appeals allowed.

Solicitor for appellants: *Registrar of Court of Criminal Appeal.*

Solicitor for Crown: *Director of Public Prosecutions.*

(1) 18 Cr. App. R. 2.

R. F. S.

1925
June 17, 18;
July 2.

CON PLANCK, LIMITED *v.* KOLYNOS, INCORPORATED.

[1924. C. 2113.]

Copyright—Artistic Work—Ownership of Copyright—Design—Design capable of Registration—Non-Registration—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 49 — *Copyright Act*, 1911 (1 *& 2 Geo.* 5, *c.* 46), *ss.* 1, 5, 22, 35 — *Patents and Designs Act*, 1919 (9 *& 10 Geo.* 5, *c.* 80), *s.* 19—*Designs Rules*, 1920 (*St. R. & O.*, 1920, *No.* 337), *r.* 89.

The plaintiffs claimed to be the assignees from the author of two sketches for cut-out advertisement show cards representing a pierrot and pierrette respectively with large faces and diminutive bodies. These sketches were shown by the author to the defendants with the defendants' name upon them with the view of being used by them for advertisement purposes. At the suggestion of the defendants the colour of the costumes of the figures was changed from mauve to green and yellow; the colour of the lettering of the defendants' name was also changed from red to green and yellow. The defendants ordered a number (about 10,000) of the sketches so altered at a price which gave the author a very considerable profit. Subsequently the defendants obtained a number of the sketches from sources other than the plaintiffs'. Neither the plaintiffs nor the author had registered the sketches as designs under the Patents and Designs Act, 1907. In an action by the plaintiffs for infringement of copyright:—

Held, (1.) that under s. 5, sub-s. 1 (*a*), of the Copyright Act, 1911, the defendants were the first owners of the copyright in the original sketches, as the sketches were ordered by, and were made for, them for valuable consideration and were "engravings" within the meaning of that sub-section.

(2.) That the sketches were designs which were capable of being registered under the Patents and Designs Act, 1907, and as they were used or intended to be used as models or patterns to be multiplied by an industrial process, the Copyright Act, 1911, by reason of s. 22, did not apply to them, and that as the sketches had not been registered as designs under the Act of 1907 the plaintiffs could not succeed.

ACTION tried before Sankey J.

The plaintiff company claimed to recover damages from the defendants—who were manufacturers of a tooth paste called "Kolynos"—for the infringement by them of the plaintiffs' copyright in two sketches or cut-out advertisement show-cards, and an injunction to restrain the defendants from further infringement.

The sketches in question were of a pierrot and pierrette

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with very diminutive bodies, very large faces and a smile which enabled them to display their teeth. The faces were in fact coloured photographs of a well known entertainer and a well known dancer. The sketches were cut out and mounted upon wood which, being inserted in a block, could be made to stand erect, and so represent a pierrot with a small body and a large head, the whole being about ten inches in height.

The plaintiffs claimed that under the Copyright Act of 1911 they had a copyright in these sketches as being artistic works within the meaning of s. 1, sub-s. 2, of the Act. (1)

The following statement of facts is taken from the judgment: "As far back as 1920 [a certain gentleman named Mr. Con] Planck conceived the idea of designing photographs and cut outs for the purposes of advertisement. He saw during the war, in London, such photographic cut outs with pictures of Lord Haig, Marshal Foch, and other distinguished soldiers. The idea came from the south of France, and such sketches

(1) Copyright Act, 1911, s. 1, sub-s. 1: "Subject to the provisions of this Act, copyright shall subsist throughout the parts of His Majesty's dominions to which this Act extends for the term hereinafter mentioned in every original literary dramatic musical and artistic work. . . . ."

Sub-s. 2: "For the purposes of this Act, 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever. . . . ."

Sect. 5, sub-s. 1: "Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein: Provided that—(a) where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other original was ordered shall be the first owner of the copyright; . . . ."

Sect. 22, sub-s. 1: "This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process."

Sect. 35, sub-s. 1: "In this Act unless the context otherwise requires, — 'Artistic work' includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs.

"'Engravings' include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs."

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were commonly sold in London during the war, and the only difference between them and Mr. Planck's sketches, which are the subject matter of this case, is that the latter had the advantage of a very large head with a very small body. In July, 1920, he worked out some sketches on the above lines for the production of a pierrot and pierrette and obtained permission from a well known entertainer and a well known dancer to use photographs of their faces. He procured the photographs, which he painted, designed a small body for each of the faces, cut them out and mounted them upon wood. The body was painted with a mauve costume and a white ruffle.

"Mr. Planck being minded to approach the defendant company to see whether they would have copies made for advertising purposes, put the defendants' trade name 'Kolynos' upon each sketch in red lettering and took the sketches to them. The defendants are manufacturers of a tooth paste called 'Kolynos.' Mr. Saunders, one of the defendants' managers, was struck with the design, but objected to the colour. He said that the colours used by the company in all their advertisements were yellow and green. Mr. Planck replied that the defendants could have any colour they liked. He called again on several occasions with the sketches greatly altered as far as colour was concerned. Unfortunately the original sketches in mauve have been lost. What, without begging the question, I may call the second sketches in green and yellow were submitted to Mr. Coome of the defendant company and Mr. Saunders the principal in November, 1920. They wanted to see proofs. Mr. Planck prepared some proofs which met with the approval of the defendant company, and in the result an order was given for 5000 of each sketch at a price of 2*s.* 3*d.* each. The sketches were produced, and Mr. Planck was paid the sum of 1110*l.* 3*s.* for them.

"Whether it is material to go into the question of price received is doubtful. Mr. Planck naturally did not desire to state what his profits were, but evidence given for the defence satisfied me that the profits he made were very

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considerable. Allowing for the sums he would probably pay to lithographers, to persons who cut out the wood, for paper, ink and so forth, and putting on a profit of 25 per cent., the amount received by Mr. Planck was very much in excess of such a total. One of the witnesses for the defence, whose evidence I accept, said that if he had been asked to tender for the work his price would have been about 500*l.*, and that would have included the price for the two original sketches, for which he allowed 20*l.* each. I doubt the materiality of this evidence and I do not rely upon it for the purposes of my judgment, but it is necessary to find the fact in case the defendants wish to make use of it hereafter.

"By an indenture of October 20, 1923, Mr. Planck assigned his rights to the plaintiff company, and in February, 1924, it came to the company's knowledge that the defendants were obtaining a supply of the sketches from other sources. They now bring the present action for the purpose of ascertaining their rights.

"A considerable volume of evidence was called, the most important of which was certainly that of Mr. Ballantyne, a distinguished and experienced Fellow of the Chartered Institute of Patent Agents."

Mr. Ballantyne, who was called on behalf of the defendants, said that there would not be any objection from the Patent Office to the registration of the design on the ground of novelty. They did not consider that their duty was merely to have regard to the big head and the small body; they considered the appeal to the eye of the design as a whole—of the complete article. He also said that it was the application of an artistic work to a series of other articles which constituted the design. He had examined the cards in question and in his opinion they were designs capable of registration as designs under the Patents and Designs Act, 1907, and they came within rule 89 (*a*) of the Designs Rules of 1920 as being designs used or intended to be used as models or patterns to be multiplied by an industrial process; and that they were designs to which the Copyright Act, 1911, did not apply,

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because they were capable of being registered under the Patents and Designs Act, 1907, and were also designs intended to be used as models or patterns to be reproduced by an industrial process—namely, by lithography.

Holman Gregory K.C. and *J. D. Casswell* for the plaintiffs.

A. Neilson K.C. and *Graham Mould* for the defendants.

The plaintiffs are not the authors of the sketches, which are the joint production of Mr. Planck and the defendants. The sketch which Mr. Planck exhibited to the defendants showed a pierrot in a mauve costume with lettering in red, and it was at the defendants' suggestion that the colour and lettering was altered to green and yellow, and owing to that alteration in colour the appeal which the design made to the eye was completely changed. The defendants are under s. 5, sub-s. 1 (*a*), of the Copyright Act, 1911, the first owners of the copyright in the sketches, because the sketches were ordered by them and were made for valuable consideration, and there was no agreement to the contrary with regard to the copyright. By s. 35, sub-s. 1, "engravings" include lithographs. The reproductions of the sketches in the present case come within that definition because they were reproduced by lithography. It was held in *Boucas* v. *Cooke* (1), following the decision in *Pollard* v. *Photographic Co.* (2), that where a photographer takes a photograph at the request of the sitter upon the terms that the sitter will pay for taking it, or under circumstances which raise an implied promise to pay on the sitter's part, the photograph is "made or executed for or on behalf of any other person for a good or valuable consideration" within the meaning of s. 1 of the Fine Arts Copyright Act, 1862, and the copyright in the photograph is in the sitter. The words in that section are very similar to those in s. 5 of the Act of 1911. That case was cited with approval in *Stackemann* v. *Paton*. (3) These sketches are designs to which the Copyright Act, 1911, does not apply by reason of the provisions of s. 22 of that Act, inasmuch as they are capable

(1) [1903] 2 K. B. 227. (2) (1888) 40 Ch. D. 345.
(3) [1906] 1 Ch. 774.

of being registered under the Patents and Designs Act, 1907, and they do not come within the exception in that section as they are used or intended to be used as models or patterns to be multiplied by an industrial process—namely, by lithography. These sketches were called into being for the purpose of being used as advertisements and reproduced, and therefore the present case is very different from a case where a picture like "Bubbles" was subsequently purchased for the purpose of being used as an advertisement. The designs which are excluded from protection under the Copyright Act, 1911, are defined by r. 89 of the Designs Rules, 1920, which provides that "a design shall be deemed to be used as a model or pattern to be multiplied by any industrial process within the meaning of s. 22 of the Copyright Act, 1911—(*a*) When the design is reproduced or is intended to be reproduced in more than fifty single articles, unless all the articles in which the design is reproduced or is intended to be reproduced together form only a single set, as defined by r. 5 of these Rules." Fletcher Moulton L.J. said in *In re Bayer's Design* (1) that "Designs apply to nothing but that which the eye can tell entirely. Nothing in my opinion is a good design but that of which full knowledge is given when you have once shewn to the eye what your design is. It may be shape or configuration; that is given by a specimen or by a proper drawing, and the eye can see it, and the eye can recognise whether it has been imitated. It may be by a pattern, to which the same applies. It may be by an ornament, to which the same applies. But in my opinion nothing beyond that can rightly be called a design within the meaning of this statute." The fundamental distinction between a "design" and a simple "artistic work" lies in the applicability of the former to another article; that is to say, an artistic work is bought purely and simply for its artistic properties, an article to which a design has been applied is bought not simply because of the artistic qualities of the design, but because of the utility of the article apart from the

(1) (1906) 24 R. P. C. 65, 77.

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design: see Copinger's Law of Copyright, 5th ed., p. 97. Copinger thought that both Christmas cards and advertisement posters came within the Copyright Act whereas MacGillivray in his edition of the Copyright Act, 1911, thought that Christmas cards ought to be registered as designs, while posters need not be registered and would enjoy full protection as artistic works. The meaning of s. 22 of the Copyright Act, 1911, however is that those designs which are capable of being registered for commercial purposes are not to have any protection under the Copyright Act.

[*Gunston* v. *Winox, Ld.* (1) was also cited.]

Holman Gregory K.C. in reply. It is clear from the definition of "design" in s. 19 of the Patents and Designs Act, 1919 (2), that a design is not something which is to be used, or sold, or produced, but is something which is to be applied to an article. The words in s. 22 of the Copyright Act, 1911, "designs capable of being registered under the Patents and Designs Act, 1907," mean a design intended or produced for application to an article. A design is something produced as a pattern to assist in the making of another article which shall appeal to the eye. This sketch is not a design, because it was intended that the pierrot should be the article and should not be applied to any other article. If claim for registration is made in respect of artistic work, inasmuch as the artistic work is itself the article it is not capable of registration, but when a design is intended or produced for application to another article it becomes a design capable of registration. A design is a thing which has no market in itself, but is meant to be applied to some other article, whereas an artistic work

(1) [1921] 1 Ch. 165, 664.

(2) Patents and Designs Act, 1919, s. 19: "In s. 93 of the principal Act, for the definitions of . . . . 'design' the following definitions shall respectively be substituted—

. . . . . .

'Design' means only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device."

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has a market for its own sake. This sketch of a pierrot has a market for its own sake.

Sect. 5 of the Act of 1911 has no application to the facts of the present case. That section was intended to apply to a case where an idea had occurred to a person who was no artist and who had therefore to go to another person and instruct him to prepare the model. In that case the copyright would remain in the person who conceived the idea and ordered the model and promised to pay for it, and would not be in the person who actually brought the model into existence. In the present case the artistic work was invented and produced by Mr. Planck, who showed it to the defendants; they did not give him an order to produce it. If the finished article was entirely different from the original sketch owing to the numerous alterations made in it at the suggestion of the purchaser there might be a question as to who ordered the finished article, but that is not the case here, because Mr. Planck invented something which was useful whatever the colour of the costume of the figure. The artistic work was the combination of the head of a good-looking person having good teeth with a well proportioned miniature which was gradually reduced down to the feet. The case of *Gunston* v. *Winox, Ld.* (1) has no application to the present case.

Cur. adv. vult.

July 2. SANKEY J. read the following judgment: The plaintiff company claim damages for the infringement of their copyright in two sketches or cut-out advertisement cards, and an injunction to restrain the defendants from further infringement. The sketches in question are of a pierrot and pierrette with very diminutive bodies, very large faces, and a smile which enables them to display their teeth. The faces are in fact coloured photographs of a well known entertainer and a well known dancer. The sketches are cut out and mounted upon wood, which being inserted in a block can be made to stand erect, and so represent a

(1) [1921] 1 Ch. 165, 664.

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pierrot with a small body and a large head, the whole being about ten inches in height.

The plaintiffs claim that the Copyright Act of 1911 gives them a copyright in these sketches as being artistic works within the meaning of s. 1, sub-s. 2, of the Act.

The defendants raise a number of defences: (1.) There is no copyright because no novelty. (2.) The plaintiffs were not the authors of the sketches, which were either the production of the defendants or at any rate the joint production of the plaintiffs and defendants. (3.) Under s. 5, sub-s. 1 (*a*), of the Copyright Act, 1911, the defendants are the first owners of the copyright, because the original sketches were ordered by them and made for them for valuable consideration. (4.) Under s. 22 of the Copyright Act, 1911, the sketches are designs to which the Copyright Act does not apply and which ought to be registered under the Patents and Designs Act, 1907, and that as they have not been so registered the plaintiffs are not entitled to succeed. (5.) If there is copyright, by a custom of the printing trade the defendants must be held to have purchased the copyright; and (6.) The copyright belonged to a gentleman, Mr. Con Planck, and there is no assignment thereof to the plaintiff company.

I will first find the facts and then deal with each of the defences. [His Lordship stated the facts set out above and continued:] I now turn to the defences, and will deal with any further fact necessary for a particular defence.

(1.) There is no copyright because no novelty. This is a question of fact. Having regard to the evidence of the plaintiff and of Mr. Ballantyne I am against the defendants on this point. In my opinion the idea was one which had not previously been used by any advertiser and was novel.

As to (2.) and (3.). (2.) The plaintiffs were not the authors of the sketches, but they were either the production of the defendants or at any rate the joint production of the plaintiffs and defendants. (3.) Under s. 5, sub-s. 1 (*a*), of the Copyright Act the defendants are the first owners of the copyright,

because the original sketches were ordered by them and made for them for valuable consideration. These two points have given me great trouble. They really are interwoven. Mr. Planck says that he, or rather the plaintiff company, is not claiming copyright for the original mauve sketch, but for the one in green and yellow which was produced subsequently. He does not, I think, mean to claim, although he was not very clear on the point, copyright in the sketch with the word " Kolynos " on it, but alleges that he could have used, and was entitled to have, the sketch in green and yellow without such word as a stock design upon which he could have put somebody else's name or advertisement. It is very unfortunate that the original mauve sketch has been lost. I cannot help thinking that it made a very different appeal to the eye from the one for which the plaintiffs now claim copyright, and that the suggestion made by the defendants is well founded as to the alteration in colouring resulting in a sketch which looked very different from the original mauve one. It is open to serious doubt whether Mr. Planck was the producer of the yellow and green sketch. On the whole, however, I have come to the conclusion that he was, but in my view it was an " engraving " within the meaning of s. 5 of the Copyright Act, 1911, by reason of the definition of the word " engraving " in s. 35 of the Act, which includes lithographs. In my opinion this is a case of an engraving which was ordered by the defendants and was made for valuable consideration in pursuance of that order, that there is no agreement to the contrary, and that the defendants being the persons by whom the original was ordered are the first owners of the copyright, if copyright there be. It is not without significance that the defendants have always been in possession of the original sketches, although Mr. Planck somewhat enigmatically said that " they were kind enough to keep the original for me but never returned it."

As to (4.): That under s. 22 of the Copyright Act, 1911, the sketches are designs to which the Copyright Act does not apply and which ought to be registered under the Patents and Designs Act, 1907, and that as they have not been so

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registered the plaintiffs are not entitled to succeed. This is the really difficult point of the case. Sect. 22 of the Copyright Act, 1911, reads as follows: "This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process." That section made an alteration in the law. In the absence of such a section it might be that copyright existed in sketches like the present ones. The case is put as follows: It is said that each of these sketches is an "artistic work" and therefore there is copyright in them by s. 1, sub-s. 2 (*c*), of the Act, because by s. 35 "'artistic work' includes works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs." The real question involved therefore is this: Is the sketch in question a design which should be registered under the Patents and Designs Act, 1907, or is it an artistic work which is entitled to the longer protection which is given to such works by the Copyright Act? A "design" within the meaning of the Patents and Designs Act, 1907, is now defined by s. 19 of the Patents and Designs Act, 1919, as meaning "only the features of shape, configuration, pattern, or ornament applied to any article by any industrial process or means, whether manual, mechanical, or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction, or anything which is in substance a mere mechanical device." What then is the fundamental distinction between a design and artistic work. This is a point which the writers of the various text-books have found to be one of great difficulty and upon which they differ. There have been discussions as to whether Christmas cards and posters fall under one or other category. It would be impossible and I think undesirable to lay down any definition. As each case comes up for determination an endeavour must be made to say upon which side the particular case lies, and no doubt in course of time a

multiplication of examples may lead to an attempted definition. It may be right to say, as is said in the last edition of Copinger's Law of Copyright, 5th ed., p. 97, that the fundamental distinction between a design and a simple artistic work lies in the applicability of the former to some other article. The plaintiffs contended that a design is something produced as a pattern to assist one in making some other article which shall appeal to the eye; a thing which has no market in itself but is meant to be applied to some other article. I am disposed to think that these definitions are approximately correct, but I am far from saying that they assist the plaintiffs in the present case.

I have had the great advantage of Mr. Ballantyne's evidence. He assured me that having examined the sketches in question it is his opinion that they are designs which are capable of registration under the 1907 Act, and that they do not come within the exception of the section. In my view that is right. I think that the designs were capable of being registered under the 1907 Act, and, so far as it is a question of fact, I find that they were designs which were used and intended to be used as models or patterns to be multiplied by an industrial process. In these circumstances they ought, in my opinion, to have been registered under that Act, and as no registration has been effected the plaintiffs are not entitled to succeed.

(5.) With regard to the custom I hold against the defendants. Their evidence broke down. The first witness, Mr. Tanner, got nowhere near proving a custom. Mr. Wolffe's evidence upon this point, although I accept it on another, was too hazy, and Mr. Feldman, although he had been twenty-five years in the trade, had never heard of such a custom. What they said with regard to custom was probably an imperfect endeavour to state the effect of s. 5 of the Copyright Act, 1911.

As to (6.): That the copyright belonged to a gentleman, Mr. Con Planck, and there is no assignment thereof to the plaintiff company. It is unnecessary for me to decide this point, but I gave leave for Mr. Planck to be added as a

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plaintiff, subject to any question of costs, Mr. Planck having given his consent in writing to such a course.

In the result my judgment is for the defendants with costs.

Judgment for defendants. (1)

Solicitors for plaintiffs: *MacDonnell & Co.*

Solicitors for defendants: *Mawby & Barrie.*

R. F. S.

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June 11.

A. W., LIMITED *v.* COOPER AND HALL, LIMITED.

Practice—County Court—High Bailiff—Withdrawal of High Bailiff on Request of execution Creditors—Order by Judge for payment of Fees—Right of Appeal —"Party in any . . . . matter"—"Matter"—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 120, 186—*County Court Rules,* 1903–1923, *Order* XXVII., *r.* 1, *sub-r.* 2.

A Divisional Court has jurisdiction to hear an appeal from the decision of a county court judge who, under the provisions of Order XXVII., r. 1, sub-r. 2, of the County Court Rules, 1903–1923, has, on the application of the high bailiff, made an order against the execution creditors, who have directed the high bailiff to withdraw, for payment of his fees.

County Court—Execution—High Bailiff—Possession Fees—Seizure of Goods in custodia legis—"Walking possession"—County Courts Act, 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 146, 152—*County Court Rules,* 1903–1923, *Order* XXVII., *r.* 1, *sub-r.* 2, *Form* 163—*County Court Fees Order,* 1924, *St. R. & O.* 1924, *No.* 940/*L.* 13, *sect. VI., cl.* 57.

On May 15, 1924, the high bailiff of a county court under a warrant of execution purported to levy upon the goods of the judgment debtors at their premises, and put a man in possession. The sheriff was then in possession of the goods under process of an earlier date, but not to the knowledge of the high bailiff, as the county court judge found. The high bailiff on taking possession received from the judgment debtors a document which stated that in consideration of his withdrawing from possession they authorized him at any time to re-enter and undertook not to remove any of the goods. On June 12, 1924, the high bailiff on the instructions of the judgment creditors withdrew from possession. The execution was ineffective, except in so far as it brought the parties into negotiation with a view to a settlement. The high bailiff made an

(1) The plaintiffs appealed against this decision, but the appeal was subsequently dismissed by consent.

application to the county court judge under the County Court Rules, 1903–1923, Order xxvii., r. 1, for an order for payment by the judgment creditors of his fees for keeping possession from May 15 to June 12. The county court judge found that the high bailiff did not withdraw from possession, but was in actual possession and not in mere walking possession of the goods, and made an order for payment of the fees claimed. On appeal:—

Held, first, that the possession of the sheriff did not in the circumstances prevent the high bailiff from taking and keeping such possession as would entitle him to claim fees; secondly, that there was evidence to support the finding of the county court judge that the high bailiff did not withdraw from possession, but kept actual as distinct from walking possession; and therefore that the order of the county court judge was right.

Thomas v. *Peek* (1888) 20 Q. B. D. 727 principle applied.

White v. *Chapple* (1847) 4 C. B. 628 explained.

Appeal from Bow County Court.

On March 4, 1924, the appellants, A. W., Ld., obtained judgment in Westminster County Court against Cooper & Hall, Ld., tin manufacturers, for 43*l.* 4*s.* 11*d.* On March 7, 1924, the appellants obtained from that court a warrant of execution against the judgment debtors, but the warrant was returned marked "No goods." On May 10, 1924, it having been ascertained that there were goods of the judgment debtors at their works within the jurisdiction of Bow County Court, the appellants' solicitors wrote to the Westminster County Court requesting that the warrant should be sent to the Bow County Court with instructions to the high bailiff of the latter court to execute the warrant at the works of the judgment debtors at Bow. On May 14, 1924, this letter and the warrant were forwarded to the high bailiff of the Bow County Court (hereinafter called "the respondent").

On May 15, 1924, the respondent, in accordance with the instructions in the letter, went to the premises at Bow and purported to levy execution there, putting in possession one Edward Lewis under the supervision of one Ernest Hancock in the employment of the respondent. On the same date, May 15, a document signed by S. Ginzler, the works manager of the judgment debtors, which was in fact signed on that date, though it was dated May 21, 1924, was sent to the respondent and his assistants, the document being in the

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following terms: "In consideration of your withdrawing from possession of our goods levied under this warrant, and pending a satisfaction of the judgment, we hereby authorize you at any time to re-enter and take possession, and we undertake not to remove or allow to be removed any of the goods levied." On May 24, 1924, the appellants' solicitors on behalf of the appellants wrote to the respondent stating that they had had an offer of settlement from the solicitors of the judgment debtors, and requesting the respondent not to proceed to sell the judgment debtor's effects until he heard further, but to continue in possession. On May 27, 1924, the appellants' solicitors wrote again to the respondent stating that terms of settlement were still under consideration, requesting him to inform them of the amount payable under his warrant up to and including May 29 then next and the extra amount per day subsequently, and further requesting him to remain in possession until instructed by them to withdraw. The respondent wrote to the plaintiffs' solicitors in reply giving a note of his fees and expenses. On June 5, 1924, Lewis, the respondent's man, met on the said premises a man named Charles Gooding, who said that he was the representative of the sheriff of the county, and had been in possession continuously since the date of a warrant which he produced dated January 30, 1924. On the same date, June 5, the respondent wrote to the sheriff's solicitors stating that he was in possession, having levied on May 15 on a warrant which was applied for on March 7 then last, that he found that the sheriff had levied under a warrant against the judgment debtors and should be glad to know the date of the delivery of that warrant to the sheriff, so that they could determine who was entitled to priority, and that he must sell without delay. That letter was written in view of the County Courts Act, 1888, s. 152. On June 6, 1924, the sheriff's solicitors replied that the sheriff had been in possession since January 31, and that there was now a claim by Lloyds Bank under debentures for 1500*l*. On the same date, June 6, the appellants' solicitors wrote to the respondent requesting him to withdraw from possession on payment by the judgment

debtors of his charges. The high bailiff's charges were not paid, and he did not immediately withdraw from possession. On June 10, 1924, the respondent gave notice to the appellants' solicitors that the goods taken in execution by him had been claimed by Lloyds Bank under debentures. On June 11, 1924, the appellants' solicitors wrote to the respondent stating that they were in receipt of his notice, that the appellants would admit the title of the claimants to the goods, that they (the writers) had arranged payment of the debt and costs, by certain instalments, on the understanding that the judgment debtors would pay the respondent's fees, and that they had by this post written to the solicitors for the judgment debtors on the subject. On June 12, 1924, the respondent withdrew from possession of the goods in accordance with his instructions.

The respondent applied to the judgment debtors for payment of his fees, but they refused to pay them, and he then applied to the appellants, but without effect.

Eventually, in August, 1924, the respondent made an application to the judge of Bow County Court under the County Court Rules, 1903–1923, Order XXVII., r. 1, sub-rr. 2, 6 (1), for an order for payment by the appellants of his fees and expenses for twenty-nine days' possession.

On December 10, 1924, and January 14, 1925, the application of the respondent was heard by the county court judge. On behalf of the respondent evidence was given as follows:

(1) County Court Rules, 1903–1923, Order XXVII., r. 1, sub-r. 2: "If . . . . the execution creditor gives notice to the high bailiff that he admits the title of the claimant to the goods or chattels, or requests the high bailiff to withdraw from possession . . . . he shall only be liable to the high bailiff for any possession fees or expenses incurred by the high bailiff prior to the receipt of such notice; and the judge may, if he thinks fit, on application by the high bailiff, make an order for payment of any such fees or expenses by the execution creditor to the high bailiff. Any such application shall be made in writing, and intituled in the matter of the execution, and three clear days' notice in writing thereof shall be given by the high bailiff to the execution creditor."

Sub-r. 6: "The judge upon the hearing shall adjudicate upon any claim of the high bailiff for fees, and may, if he thinks fit, order the same, or such part thereof as he may think just, to be paid by the claimant or by the execution creditor."

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Hancock stated that on May 15, 1924, he left Lewis in possession at the premises; that he went there two or three days after and on many subsequent occasions, twelve or fifteen times in all, up to June 12, 1924, and on every occasion found Lewis there; and that on no occasion did he ever see the sheriff's officer or his man there. Lewis stated that on May 15 he went with Hancock to the premises and was there every day till June 12; that about three weeks after he took possession he saw Gooding, who said he was in possession for the sheriff, and produced a warrant dated January 30, 1924; that when he asked Gooding why he had not seen him before, the latter replied that he had been there frequently, but did not happen to drop across Lewis; and that it was never suggested that he knew until he met Gooding that any one was in possession except himself. On behalf of the appellants, the judgment creditors, evidence was given that the sheriff's representative had been in possession at the premises under various warrants from January 11, 1924, to June 18, 1924.

On January 14, 1925, the judge delivered judgment, in the course of which he said that he thought it was clear that the possession of the respondent was so far effective that it brought the execution debtors and the execution creditors into negotiation; that he accepted Lewis's statement that he knew nothing of the presence of the sheriff until he had been about three weeks in possession; that while the respondent was right in making inquiry of the sheriff, it was not part of his duty to find out when he went to the premises whether any one else was there; that if there had been any one else presumably he would have come forward and told the respondent to leave, and that, if the respondent had known of the walking possession of the sheriff, that should have been effective enough to prevent the former from selling; that according to *White* v. *Chapple* (1) the mere fact of the goods having been seized by the sheriff did not constitute an answer to the claim; that in his (the judge's) opinion the general property in the goods did not pass to

(1) 4 C. B. 628.

the sheriff, as in the case of a special receiver or trustee in bankruptcy, but that a special or statutory property only was vested in him for the purpose of passing so much of the property seized to a purchaser as would satisfy the claim; that the general property remained in the execution debtors who could maintain trover: *Giles* v. *Grover* (1); that it was laid down in *Thomas* v. *Peek* (2) that the statutes and rules gave the judge the right and a discretion in its exercise to award possession money to the high bailiff, although the latter had taken and held wrong goods; that he was of opinion that in the present case the respondent only did his duty in seizing the goods and remaining in possession of them; that, if the sheriff's prior claims had been less or the goods of greater value, the respondent's possession might have been most fruitful; and that in his view the respondent was entitled to possession money as from the date on which he entered, May 15, to the date on which he first heard from the plaintiffs that they admitted the prior title of Lloyds Bank, June 12; and an order was accordingly made for payment to the respondent of 14*l.* 10*s.*, the amount of his charges, with costs.

The appellants, the judgment creditors, appealed.

Morle and *de Ferrars* for the appellants.

Cave K.C. and *Julian Fuller* for the respondent. There is a preliminary objection to this appeal. The only right to appeal from the county court is under s. 120 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which gives the right to "any party in any action or matter." This application to the judge by the high bailiff was neither an action nor a matter, nor was the high bailiff a "party" within the meaning of the section. The only "action or matter" was that of *A. W., Ld.* v. *Cooper & Hall, Ld.*, and the application was merely a collateral matter in that action. There is no authority on the point, but there is a note in the Yearly County Court Practice for 1924, p. 133: "Where a matter is the mere subject of a summary application an appeal

(1) (1832) 1 Cl. & F. 72. (2) 20 Q. B. D. 727.

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from a decision as to it will not lie." The decision was entirely a matter of discretion in the judge. No doubt, if the high bailiff had chosen to bring an action for his fees against the execution creditors an appeal would lie. But here he was an applicant, not a party, and it was because he was under the disciplinary jurisdiction of the Court that the matter was made discretionary in the judge. Under the rule previous to 1896 the high bailiff would have had to bring an action for his fees, and he had an appeal; in 1896 the latter words of the rule were added (1), one object of the addition, it is submitted, being to abolish these actions and appeals.

Morle for the execution creditors. This is a "matter" within the definition in s. 186 of the Act of 1888: "'Matter' shall mean every proceeding in the court, which may be commenced as prescribed otherwise than by plaint." Every requirement of that definition is fulfilled in this case, and if it is a "matter" the respondent was clearly a party to it.

Cave K.C. in reply. Sect. 120 is not applicable to a claim to be paid fees arising out of a claim to which others were parties. Everything in which a judge is asked to give a decision is not a "matter" within the Act.

Salter J. In this case the high bailiff of Bow County Court made an application to the judge of that court under Order xxvii., r. 1, sub-r. 2, of the County Court Rules, 1903–1923, for an order that the execution creditors should pay him certain fees. An action had been brought by the plaintiffs, A. W., Ld., against the defendants, Cooper & Hall, Ld., in Westminster County Court, which resulted in a judgment for the plaintiffs for a sum of about 40*l*. Nothing belonging to the defendants could be taken in execution in the district of Westminster County Court, and the warrant was sent for execution to Bow County Court. There goods were found which were thought to be those of the defendants, the execution debtors, and on instructions from the execution creditors they were seized by the high bailiff of Bow County Court. The goods were afterwards claimed by third parties,

(1) See note (1) ante, p. 819.

and the claim was admitted by the execution creditors, who directed the high bailiff to retire. Upon that the high bailiff acquired certain rights under Order XXVII., r. 1, sub-r. 2, of the County Court Rules, 1903–1923. That rule provides. [His Lordship read it. (1)] As it originally stood the rule ended at the words "receipt of such notice," and the rest of the rule was added in 1896. Until so amended, therefore, it was necessary for the high bailiff to bring an action for his fees, as was done in the case of *Thomas* v. *Peek* (2), and in such a case there would of course be an appeal. It is clear that it was thought desirable that a more summary and less expensive method of recovery should be given to the high bailiff, and accordingly, in 1896, the words as they now stand were added to the rule. The high bailiff has availed himself of this rule, has given the proper notice, and applied by counsel to the judge for an order for payment, which the judge has made. The question we have to decide is whether there is an appeal from that order.

An appeal, if there be one, lies under s. 120 of the County Courts Act, 1888, only. That section provides in general terms that if any party to an action or matter is dissatisfied he may appeal—that is to say, any party to any action or any party to any matter. In certain cases an appeal is only given by leave of the judge. No question arises on that point, for in this case the judge gave leave to appeal. The question therefore is whether there was here a "matter" within the meaning of s. 120 of the Act of 1888, and if so, whether the high bailiff was a party to that matter. I have come to the conclusion, after some little doubt, that there was a matter, and that the high bailiff was a party to it. "Matter" is defined in s. 186 of the Act of 1888 as follows: "'Matter' shall mean every proceeding in the court, which may be commenced as prescribed otherwise than by plaint." This clearly was a proceeding in the court, and it was commenced as prescribed by Order XXVII., r. 1, sub-r. 2, and it was commenced otherwise than by plaint.

A more difficult question is whether the high bailiff was

(1) See note (1) ante, p. 819. (2) 20 Q. B. D. 727.

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a party, that is to say, whether there is a new matter which has come into existence or whether the only matter in question is the old matter. On the whole I think the application to the judge was a new matter, and that the high bailiff comes within s. 120 of the Act, giving him an appeal. The preliminary objection, therefore, fails.

Swift J. I agree.

Objection overruled.

W. L. L. B.

The Court then proceeded to hear the questions raised on the appeal.

Morle and *de Ferrars* for the appellants. The respondent, the high bailiff, is not entitled to recover from the appellants, the judgment creditors, the fees which he claims for having, as he alleges, kept possession of the goods of the judgment debtors during the period from May 15 to June 12, 1924, inasmuch as he was not in possession of the goods during that period or any part of it.

First, the respondent, even if he was in actual possession of the goods, was not during that period or any part of it in legal possession of the goods. At the commencement of that period the goods were already in the possession of the sheriff under writs of execution, and they continued in his possession until after the expiry of that period. There is here no finding of the county court judge that the sheriff ever abandoned possession during the period in question, and there is not even any evidence to support such a finding. During the whole of the period in question the goods were in the custody of the law, and goods in the custody of the law under a previous execution or any other form of legal process, such as a distress for rent, cannot be taken in execution: Yearly Practice, 1924, p. 163n. The case of *White* v. *Chapple* (1) is not an authority for holding that in the present case the respondent was entitled to seize the goods in question. In that case goods in the custody of the sheriff having during his temporary

(1) 4 C. B. 628.

absence been seized by an officer of the palace court under process of that court, an application was made to the High Court for an order to attach the officer or to compel him to refund a sum paid to him to obtain the release of the goods, and, while it was there decided that the relief claimed could not be granted, it was not decided that the sheriff had abandoned possession or that the officer was entitled to seize the goods. The instructions given by the appellants to the respondent to seize the goods of the judgment debtors could not entitle him to seize goods of which the sheriff was already in possession.

Secondly, the respondent was not during the period in respect of which he claims or any part of it in the actual possession of the goods. The high bailiff's fees in such a case as this depend upon the Treasury Order, December 30, 1903, Sch. B, cl. 35, which provided that the high bailiff was entitled to fees "for keeping possession of goods," and they are now regulated by the County Court Fees Order, 1924, dated August 12, 1924, sect. VI., cl. 57, in similar terms. The officer of a Court ordered to seize goods does not keep possession of them so as to become entitled to fees unless he retains real and effective as distinct from constructive or "walking" possession of them : *Lumsden* v. *Burnett* (1) ; and *Glasbrook* v. *David & Vaux.* (2) On the true construction of the document given by the judgment debtors to the respondent on May 15, 1924, and on the facts proved or admitted, the respondent was never in actual or effective possession, but was at most only in constructive or walking possession of the goods.

On either of these grounds the respondent never became entitled to any fees, and the order of the county court judge should be set aside.

E. W. Cave K.C. and *Julian Fuller* for the respondent, the high bailiff. The respondent is entitled to recover from the appellants the fees which he claims for the period mentioned, inasmuch as he was in legal possession of the said goods of the judgment debtors during the whole of that period.

First, he was not prevented from taking and keeping

(1) [1898] 2 Q. B. 177. (2) [1905] 1 K. B. 615.

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possession of the goods on the ground that when he took possession of them the sheriff was already in possession of them. The sheriff was not in possession of the goods at the time when the respondent seized them. If the sheriff was ever in lawful possession of the goods he had abandoned possession of them before that time. The question whether a sheriff who has seized goods has gone out of possession and abandoned possession is a question of fact: *Bagshawes, Ld.* v. *Deacon.* (1) In the present case the county court judge has found as a fact that when the respondent took possession of the goods no one else was in possession of them, and in the circumstances of the case the sheriff must be taken to have been out of possession and to have abandoned possession at that time, and he had no longer such possession as would prevent the respondent from selling: see *White* v. *Chapple* (2); and *Bagshawes, Ld.* v. *Deacon.* (1) The County Courts Act, 1888, s. 146, imposes upon the high bailiff the duty of levying execution on a warrant issued to him, and, if it should appear that the sheriff is already in possession, s. 152 provides for the determination of the question whether the sheriff or the high bailiff is entitled to priority. In the present case therefore when the respondent, having received the warrant, found no one on the premises, it became his duty to seize the goods, and if he had not done so he might have rendered himself liable to an action for trespass and to an attachment for contempt. The county court judge accepted the evidence of the respondent's representative that he knew nothing of the presence of the sheriff until he had been in possession for about three weeks. As the sheriff after taking possession so conducted himself as to lead the respondent to believe that no one was in possession, it cannot be said that the respondent did not properly take possession and is not entitled to his charges. Even if the sheriff had possession under process of a date earlier than that of the respondent's warrant and had priority, yet under Order XXVII., r. 1, the county court judge had a discretion to make an order for payment to the respondent of his charges, and as he has exercised that

(1) [1898] 2 Q. B. 173. (2) 4 C. B. 628.

discretion it ought not to be overruled. In *Thomas* v. *Peek* (1) it was held that the county court judge had a discretion to allow the high bailiff his costs, although the execution was non-effective, because the goods seized were not the goods of the judgment debtor; and on the same principle in the present case the county court judge had a discretion to allow the respondent his costs, although the execution was not fully effective because the goods were already in the custody of the sheriff.

Secondly, the respondent never withdrew from possession of the goods, but remained in actual as distinct from mere constructive or walking possession of them. The county court judge has found as a fact that the continued possession of the respondent was good de facto possession and not mere constructive or walking possession, and there is evidence to support that finding. The fact that the respondent on taking possession received from the judgment debtors the document dated May 21, 1924, did not make his possession mere walking possession. That was a purely formal document, which the respondent only took as a precaution and in order to preserve his rights as against the judgment debtors in case for any reason he should withdraw from possession. The correspondence shows that the respondent continued in actual possession down to June 12, 1924. The respondent by remaining in possession of the goods secured the rights of the appellants as effectually as if he had sold the goods.

Morle replied.

Salter J. This appeal raises two points of some practical importance to sheriffs and high bailiffs of county courts. The respondent, the high bailiff, having purported to levy execution under a warrant upon goods of the judgment debtors, availed himself of the right conferred upon him by the County Court Rules, 1903–1923, Order xxvii., r. 1, sub-r. 2, and made an application to the county court judge for an order for payment of the fees and expenses which he claimed from the appellants, the judgment creditors. The county court judge made an

(1) 20 Q. B. D. 727.

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order under the provisions of that rule for payment of the amount claimed, and the appellants now seek to have that order set aside. The question is whether or not that order is right in law.

The facts are simple. [His Lordship, after stating the facts above set out and referring to the evidence and the findings thereon of the county court judge, continued :] Two points are taken on behalf of the appellants, which are independent of each other, and it is necessary in the case of each of these points to determine the basis of fact upon which it ought to be considered.

The first of these points is that, since the sheriff was in possession of the goods on May 15, 1924, when the respondent purported to seize them, it was legally impossible for the respondent to take and keep possession, and therefore that he is not entitled to any fees. In dealing with this point I think it must be taken that the county court judge did not treat it as proved that the sheriff had abandoned possession on May 15, 1924, when the respondent entered. It seems to me to have been conclusively proved that the sheriff took possession before that date and remained in possession on and after that date under various writs of fieri facias. I think it is clear that the judge proceeded on that assumption. It appears from his judgment that he took the view that the possession of the sheriff, even if it was only walking possession, should have been effective enough to prevent the respondent from selling. In the next passage of his judgment he refers to the case of *White* v. *Chapple* (1) as showing that the high bailiff, on finding that the sheriff was absent from the premises, was entitled to enter ; but if that case be carefully looked at it will be seen that it does not militate against the view that the sheriff was still in possession. There, the sheriff having seized goods, an officer of the palace court, finding that the sheriff's officer was not on the premises, levied execution under process of that Court, and the sheriff, on discovering what had taken place, bought out the officer of the palace court and took proceedings against him in the

(1) 4 C. B. 628.

High Court for contempt and for recovery of the sum paid to him in order to buy him out; and all that the High Court there decided was that the real dispute between the parties was which of them was entitled to priority, and that proceedings for contempt or for the recovery of money were not the proper proceedings for the determination of that question. It is true that in that case Wilde C.J., referring to the action of the officer of the palace court, said: "Finding the sheriff's officer out of possession, he peaceably enters and executes the warrant entrusted to him. What other course was open to him?" (1); but I do not think that in making that observation he means to say that the sheriff was not in legal possession or that he had abandoned possession before the officer entered. In the circumstances we must therefore deal with this matter on the footing that the sheriff was in lawful occupation of the goods on May 15, 1924, when the respondent entered.

On that footing, was the county court judge right or wrong in law in making the order for payment to the respondent of the fees which he claimed? The fees of the high bailiff on the enforcement by him of a judgment of the county court were prescribed by the Treasury Order dated December 30, 1903, Sch. B, cl. 35, which provided that the high bailiff should be entitled to fees at a specified rate "For keeping possession of goods," and that clause is now replaced by the County Court Fees Order, 1924, dated August 12, 1924, sect. VI., cl. 57, which is in similar terms. The high bailiff must therefore keep possession of the goods in order to be entitled to his fees. I take it that the county court judge has a discretion to say whether the high bailiff has performed his duties in a proper manner, but it is not suggested that he has a discretion to allow him fees which are not permitted by law. In the absence of any special bargain, the rights of the high bailiff to his fees are purely statutory. He may in some cases have contractual rights to fees arising by bargain, but in the present case there is no bargain for payment of fees to the respondent. The question therefore

(1) 4 C. B. 628, 630.

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is whether or not there has been a "keeping possession" of the goods by the respondent within the meaning of the provision to which I have referred, so as to entitle him to the fees which he claims. If the word "possession" be understood in its strict legal sense, he has not kept possession of the goods, because he has never taken possession of them in that sense. It is obvious that if the sheriff was in legal possession of the goods on May 15, 1924, it was impossible for the high bailiff to take them out of the possession of the judgment debtors on that date with a view to selling them. In my view, however, the strict legal meaning of the word "possession" is too narrow a meaning of it for this purpose. In *Thomas* v. *Peek* (1), where a high bailiff brought an action for possession money, that being in those days the only way in which he could enforce his right, and it turned out that the goods seized were not the property of the judgment debtor, A. L. Smith J. said, in the course of his judgment: "It seems to me that there is here no limitation upon the power of the judge so to award, as is suggested by the appellant, viz., that he could only award possession money where the execution was effective to the execution creditor, though obviously if not effective it might be a good ground for the judge refusing the same. There may, however, well be circumstances in which, although the high bailiff has taken and held wrong goods, he should be entitled to possession money. The judge, in my judgment, had the power to award such possession money to the high bailiff, though the execution was non-effective by reason of not being upon goods of the execution debtor, and whether he did so or not was a matter purely for his discretion" (2), and the Court, which consisted of A. L. Smith and Cave JJ., there decided in favour of the plaintiff. In that case the high bailiff was held entitled to his fees, notwithstanding that the execution was abortive, and it may be pointed out that Order XXVII., r. 1, deals entirely with abortive executions. It may be said that that case is distinguishable from the present case, where the execution was abortive, not because

(1) 20 Q. B. D. 727. (2) Ibid. 730.

the goods were not the property of the judgment debtors, but for another reason—namely, that the goods could not be taken in execution, because they were already in the custody of the law. That is no doubt true, but the principle which underlies the passage which I have read from the judgment of A. L. Smith J. applies equally to this case, inasmuch as it shows that the word "possession" when used in reference to the matters now in question is not to be taken in its strict legal sense. Here the high bailiff had a statutory duty to levy execution upon the goods of the judgment debtor, he had no reason to know that the goods in question were not, as they appeared to be, in the possession of the judgment debtor, and he did his duty by levying upon these goods. The execution, although abortive, was not entirely without effect, inasmuch as it enabled the judgment creditors to get into negotiation with the judgment debtors. For these reasons I think that in the circumstances the county court judge was justified in holding that the respondent was not prevented by the presence of the sheriff from taking and keeping possession of these goods and from becoming entitled to his statutory reward.

The second point taken on behalf of the appellants, which is one of more general interest, is that the respondent did not keep actual possession of the goods, and on that ground is not entitled to any fees. It is said that the respondent, on receiving an undertaking from the judgment debtors not to remove the goods, withdrew from possession, and had at most only "walking" possession, so that there was no performance by him of his duties as high bailiff. The contention is based mainly upon the document dated May 21, 1924, and given by the judgment debtors to the respondent on his taking possession, in which they state that in consideration of his withdrawing from possession they authorize him at any time to re-enter. In my view, if a high bailiff or a sheriff, who has levied execution and whose duty it is to remain in possession of the goods seized with a view to their sale, does not do so, but withdraws from possession of the goods on an undertaking of the judgment debtor to allow him to come back,

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he does not perform his duty of "keeping" possession of the goods and is not entitled to payment of any fees. Here the respondent on taking possession of the goods received from the judgment debtors the document already referred to, which was in these terms: [His Lordship read the document.] That means that if the respondent withdraws from possession of the goods, the judgment debtors authorize him at any time to re-enter, and undertake not to remove the goods. But did the respondent withdraw from possession of the goods? There is certainly no finding by the county court judge that he did so, and the whole of his judgment is inconsistent with that view. On the contrary, the judge has found that the respondent retained possession of the goods, and there is evidence to support that finding. In my opinion, therefore, while a high bailiff who withdrew from possession and had mere "walking" possession would not be entitled to any fees, the respondent in the present case did not withdraw from possession, and on this point also the appeal fails.

Swift J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Smith, Rundell, Dods & Bockett.*
Solicitors for high bailiff: *Haynes, Robinson & Co.*

J. R.

END OF VOL. II. AND OF KING'S BENCH SERIES FOR 1925.